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(The Supreme Court.)

II] JULY [1959

SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—S. R. DAS, *Chief Justice*, N. H. BHAGWATI, B. P. SINHA, K. SUBBA RAO AND K. N. WANCHOO, JJ.

Sri Ram Ram Narain Medhi and others .. *Petitioners**

v.

The State of Bombay .. *Respondent.*

Bombay Tenancy and Agricultural Lands (Amendment) Act (XIII of 1956)—Vires of—Constitution of India (1950), Schedule VII, List II, Entry 18—Applicability—Article 31-A of the Constitution—" Estate ", meaning—Fundamental rights—If violated.

The Bombay Tenancy and Agricultural Lands (Amendment) Act (XIII of 1956) is covered by Entry 18 in List II of the Seventh Schedule of the Constitution and is a legislation with reference to " land ", and therefore that Act was within the competence of the Bombay State Legislature to enact.

" Lands " held by landholders within the definition of the term contained in section 2 (9) of Bombay Tenancy Agricultural Lands Act (XVII of 1948) are " estates " within the meaning of Article 31-A of the Constitution. The expression " estate " had the meaning of any interest in land and it was not confined merely to the holdings of landholders of alienated lands. The expression applied not only to such " estate " holders but also to landholders and occupants of unalienated lands.

The Bombay Land Revenue Code, 1879, was an existing law relating to land tenures in force in Bombay at the time when the Constitution (Fourth Amendment) Act, 1955, was passed and Article 31-A in its amended form was introduced therein and the expression "estate" had a meaning given to it under section 2 (10) there *viz.*, " any interest in land " which comprises within its scope alienated as well as unalienated land and covered the holdings of occupants within the meaning thereof.

The words " extinguishment or modification of any such rights " in Article 31-A (1) (*a*) must be understood in their plain grammatical sense and there is no scope for limitations like " in the process of such acquisition by the State of any estate or of any right therein or in the process of such acquisition ".

The impugned Act is covered by Article 31-A and is protected from attack against its constitutionality on the score of its having violated fundamental rights enshrined in Articles 14, 19, and 31 of the Constitution.

Section 7 of the Amending Act, 1956, cannot be impugned on the ground of excessive delegation of legislative power. The broad principles and policy have been laid down by the legislature, the criteria have been fixed according to which the State Government has to be satisfied that it is expedient to vary the ceiling area and economic holding already prescribed by the legislature and the mere matter of working out the details having regard to those criteria which are specifically mentioned

*Petitions Nos. 13 and 38-41 of 1957 and 55 of 1958. 18th November, 1958.

therein which has been delegated to the State Government does not amount to any excessive delegation of legislative power.

Petition under Article 32 of the Constitution of India for the enforcement of Fundamental Rights.

V. M. Limaye and *S. S. Shukla*, Advocates for Petitioners in Petitions Nos. 13, 38-41 of 1957.

Purshottam Tricumdas, Senior Advocate, (*J. B. Dadachanji*, Advocate of *Messrs. Rajinder Narain & Co.*, with him) for Petitioner in Petition No. 55 of 1958.

H. N. Sanyal, Additional Solicitor-General of India (*H. J. Umrigar*, *K. L. Hathi* and *R. H. Dhebar*, Advocates, with him) for Respondent.

The Judgment of the Court was delivered by

Bhagwati, J.—These six petitions under Article 32 of the Constitution challenge the vires of the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1956 (Bom. XIII of 1956) (hereinafter referred to as the "impugned Act"). It was an Act further to amend the Bombay Tenancy and Agricultural Lands Act, 1948 (Bom. LXVII of 1948) (hereinafter called the "1948 Act").

The petitioners are citizens of India and landholders within the meaning of the 1948 Act holding several acres of land within the State of Bombay out of which a few acres are under their own cultivation, the bulk of the lands being under the cultivation of tenants—except in the case of the petitioners in petition No. 58 of 1958 where the whole of the lands are under the cutlivation of tenants.

The 1948 Act had been passed by the State Legislature as a measure of agrarian reform on December 28, 1948, with a view to amend the law relating to tenancies of agricultural lands and to make certain other provisions in regard to those lands and the objectives sought to be achieved were thus set out in the second paragraph of the preamble :

" AND WHEREAS on account of the neglect of a landholder or disputes between a landholder and his tenants, the cultivation of his estate has seriously suffered, or for the purpose of improving the economic and social conditions of peasants or ensuring the full and efficient use of land for agricultural purposes, it is expedient to assume management of estates held by landholders and to regulate and impose restrictions on the transfer of agricultural lands, dwelling houses, sites and lands appurtenant thereto belonging to or occupied by agriculturists, agricultural labourers and artisans in the Province of Bombay and to make provisions for certain other purposes hereinafter appearing . . ."

Section 2 (8) of the said Act defined "land" to mean:

(*a*) land which is used for agricultural purposes, and includes—

(*b*) the sites of farm buildings appurtenant to such land ; and used for agricultural purposes and

(*c*) ....

(i) the sites of dwelling houses occupied by agriculturists, agricultural labourers or artisans and land appurtenant to such dwelling houses.

(ii) ...."

"Landholder" was defined in section 2 (9) of the said Act to mean:—

" a zamindar, jagirdar, saranjandar, inamdar, talukdar, malik or a khot or any person not hereinbefore specified who is a holder of land or who is interested in land and whom the State Goverment has declared on account of the extent and the value of the land or his interests therein to be a landholder for the purposes of this Act."

Under section 2 (21) of the said Act the words and expressions used in the Act but not defined were to have the meaning assigned to them in the Bombay Land Revenue Code, 1879 and the Transfer of Property Act, 1882, as the case may be.

With a view to achieve the objective of establishing a socialistic pattern of society in the State within the meaning of Articles 38 and 39 of the Constitution, a further measure of agrarian reform was enacted by the State Legislature being the impugned Act, hereinbefore referred to, which was designed to bring about such distribution of the ownership and control of agricultural lands as best to subserve

the common good thus eliminating concentration of wealth and means of production to the common detriment. The said Act received the assent of the President on March 16, 1956, was published in the Bombay Government Gazette on March 29, 1956 and came into force throughout the State on August 1, 1956.

In about November, 1956, certain landholders from Kolhapur and Sholapur districts in the State of Bombay filed petitions in the Bombay High Court under Article 226 of the Constitution challenging the constitutionality of the impugned Act on various grounds. A Division Bench of the Bombay High Court pronounced its judgment on February 21, 1957, dismissing those petitions with costs except in regard to a declaration as regards the invalidity of section 88-D of the Act. The petitioners herein thereupon filed these petitions under Article 32 of the Constitution challenging the *vires* of the impugned Act and praying for a writ of *mandamus* against the State of Bombay ordering them to forbear from enforcing or taking any steps in enforcement of the Act, costs and further reliefs.

Petition No. 13 of 1957, appears to have been filed on December 3, 1956, but effective steps therein were taken only when an application for stay with a prayer for an *ex parte* order being C.M.P No. 359 of 1957 was filed herein on March 21, 1957. Petitions Nos. 38 to 41 of 1957 were filed on March 21, 1957, and Petition No. 55 of 1958 was filed on March 19, 1958.

All these petitions followed a common pattern and the main grounds of attack were: that the State Legislature was not competent to pass the said Act, the topic of legislation not being covered by any entry in the State List; that the said Act was beyond the ambit of Article 31-A of the Constitution and was therefore vulnerable as infringing the fundamental rights enshrined in Articles 14, 19 and 31 thereof; that the provisions of the said Act in fact infringed the fundamental rights of the petitioners conferred upon them by Articles 14, 19 and 31 of the Constitution; that the said Act was a piece of colourable legislation and in any event a part of the provisions thereof suffered from the vice of excessive delegation of legislative power. The answer of the State was that the impugned Act was covered by Entry No. 18 in List II of the Seventh Schedule to the Constitution, that it was a piece of legislation for the extinguishment or modification of rights in relation to estates within the definition thereof in Article 31-A of the Constitution and that therefore it was not open to challenge under Articles 14, 19 and 31 thereof and that it was neither a piece of colourable legislation nor did any part thereof come within the mischief of excessive delegation.

As to the legislative competence of the State Legislature to pass the impugned Act the question lies within a very narrow compass. As already stated, the impugned Act was a further measure of agrarian reform enacted with a view to further amend the 1948 Act and the object of the enactment was to bring about such distribution of the ownership and control of agricultural lands as best to subserve the common good. This object was sought to be achieved by fixing ceiling areas of lands which could be held by a person and by prescribing what was an economic holding. It sought to equitably distribute the lands between the landholders and the tenants and except in those cases where the landholder wanted the land for cultivating the same personally for which due provision was made in the Act, transferred by way of compulsory purchase all the other lands to tenants in possession of the same with effect from April 1, 1957, which was called the "tiller's day". Provision was also made for disposal of balance of lands after purchase by tenants and the basic idea underlying the provisions of the impugned Act was to prevent the concentration of agricultural lands in the hands of landholders to the common detriment. The tiller or the cultivator was brought into direct contact with the State eliminating thereby the landholders who were in the position of intermediaries. The enactment thus affected the relation between landlord and tenant, provided for the transfer and alienation of agricultural lands, aimed at land improvement and was broadly stated a legislation in regard to the rights in or over land: categories specifically referred to in Entry 18 in List II of the Seventh Schedule to the Constitution, which specifies the head of legislation as

"Land, that is to say, rights in or over land, tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization."

It is well settled that these heads of legislaion should not be construed in a narrow and pedantic sense but should be given a large and liberal interpretation. As was observed by the Judicial Committee of the Privy Council in *British Coal Corporation* v. *The King*[1] :

"Indeed, in interpreting a constituent or organic statute such as the Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted."

The Federal Court also in the *United Provinces* v. *Atiqa Begum*[2], pointed out that none of the items in the Lists is to be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. This Court in *Navinchandra Mafatlal* v. *The Commissioner of Income-tax, Bombay City*[3] also expressed the same opinion and stated :—

" The cardinal rule of interpretation, however, is that words should be read in their ordinary, natural and grammatical meaning subject to this rider, that in construing words in a constitutional enactment conferring legislative power the most liberal construction should be put upon words so that the same may have effect in their widest amplitude." (See also *Thakur Amar Singhji* v. *State of Rajasthan*")[4].

Having regard to the principle of construction enunciated above it is clear that the impugned Act is covered by Entry 18 in List II of the Seventh Schedule to the Constitution and is a legislation with reference to "land" and this plea of legislative incompetence of the State Legislature to enact the impugned Act therefore fails.

If, then, the State Legislature was competent to enact the impugned Act, is the Act *ultra vires* the Constitution as infringing any of the fundamental rights conferred upon the petitioners ? In the course of the arguments before us learned counsel for the petitioners confined their attack only to the constitutionality of sections 5, 6, 7, 8, 9, 17-A, 31-A to 31-D and 32 to 32-R of the impugned Act as violative of the fundamental right guaranteed under Article 19 (1) (*g*) of the Constitution. The first question to consider in this context, however, is whether the impugned Act is protected by the Article 31-A of the Constitution because if it is so protected, no challenge on the score of the provisions thereof violating Articles 14, 19 and 31 of the Constitution would be available to the petitioners.

The relevant portions of Article 31-A which fall to be considered here read as follows :—

" (1) Notwithstanding anything contained in Art. 13, no law providing for:—

(*a*) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights. . . . . shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31.

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent..................

(2) In this article—

"(*a*) the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area, and shall also include any jagir, inam, or muafi or other similar grant and in the States of Madras and Travancore-Cochin any janman rights

(*b*) the expression " rights " in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, raiyat, under-raiyat or other intermediary and any rights or privileges in respect of land revenue."

The question which we have to address ourselves initially is whether the lands held by the petitioners, who are admittedly landholders within the definition of the

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1. (1935) A.C. 500, 518.
2. (1940) F.C.R. 110, 134.
3. (1955) S.C.J. 158: (1955) 1 M.L.J. (S.C.) 87: (1955) 1 S.C.R. 829, 836, 837.
4. (1955) S.C.J. 523: (1955) 2 S.C.R. 303, 329.

term contained in section 2 (9) of the 1948 Act, are "estates" within the meaning of Article 31-A of the Constitution.

Before we launch upon that enquiry it would perhaps be of help to note how the various land tenures originated. Baden-Powell in his Land-Systems of British India (1892) Ed., Vol. 1, dealing with the general view of land tenures traced the the origin and growth of different tenures in the manner following at pages 97-99, (Chapter IV) :—

"4. *Effects of Land Revenue Administration and Revenue-farming.*—Then again, the greater Oriental governments which preceded ours, have always, in one form or another, derived the bulk of their State-revenues and Royal property from the land. In one system known to us, "Royal lands" were allotted in the principal villages, and this fact may have suggested to the Mughals their plan of allotting special farms and villages to furnish the privy purse, and has had other survivals. But, speaking generally, the universal plan of taking revenue was by taking a share of the actual grain heap on the threshing-floor from each holding. Afterwards this was commuted for a money payment levied on each estate or each field as the case might be. . . . . . . To collect this revenue the ruler appointed or recognized not only a headman and accountant in each village, but also a hierarchy of graded officials in districts and minor divisions of territory formed for administrative purposes. These officers were often remunerated by holdings of land, and a class of land-tenures will be found in some parts of India owing its origin to these hereditary official holdings. Not only so, but during the decline which Oriental governments have usally undergone, the Revenue officials have been commonly found to merge in, or be superseded. by revenue-farmers—persons who contracted for a certain sum of revenue to be paid into the Treasury from a given area, as representing the State dues exigible from the land-holdings .within that area. Such revenue-farmers, or officials whatever their origin, have always tended to absorb the interests of the land-holders and to become in time the virtual landlords over them.

Nor is it only that landlord tenures arise in this way. No sooner does the superior right take shape than we find many curious new tenures created by the landlord or arising out of his attempts to conciliate or provide for certain eminent claims in the grade below him.

S. 5. *Effects of Assignment or Remission of Land-Revene.*—Yet another class of tenures arises in connection with the State Revenue-administration; and that is, when the ruler either excuses an existing land-holder from paying his revenues, either wholly or in part ; or "alienates" or assigns the revenue of a certain estate or tract of country in favour of some chief, or other person of importance, or to provide funds for some special objects, or to serve as a recompense for services to be rendered.

At first such grants are carefully regulated, are for life only, and strictly kept to their purpose, and to the amount fixed. But as matters go on, and the ruler is a bad or unscrupulous one, his treasury is empty, and he makes such grants to avoid the difficulty of finding a cash salary. The grants become permanent and hereditary ; they are also issued by officials who have no right to make them ; and not only do they then result in landlord tenures and other curious rights, but are a burden to after times, and have furnished a most troublesome legacy to our own Government when it found the revenues eaten up by grantees whose titles were invalid, and whose pretensions, though grown old in times of disorder, were inadmissible.

Such grants may have begun with no title to the land but only a right to the revenue, but want of supervision and control has resulted in the grantee seizing the landed right also."

Here we find the distinction between the State-owned lands which are unalienated where the tenures arise out of the exigencies of revenue collection and alienated lands the revenue whereof is remitted either wholly or in part or in other words "alienated" or assigned to grantees for various purposes.

Various land tenures thus developed and series of proprietorships came into existence. The main tenures which the British found when they came into power comprised : (1) the Khas or tenure by Government ; (2) the Ryatwari tenure ; (3) the Zamindars or landlord tenure and (4) the Taluqdari or double tenure.

It is interesting to note in this connection that in the table compiled by Baden-Powell in Vol. III of his Book at page 142 giving some idea of the distribution of the different classes of landed estates in Madras the different classes of landed estates described therein included not only Zamindaris but also "estates" held by ryots paying diverse sums as and by way of land revenue.

So far as the area within the State of Bombay was concerned the position is thus summed up in Dandekar's "Law of Land Tenures", Vol. 1, at p. 12 :

"*Section III. Classification of land according to the interest of the holder.*—Land is either Government land or not Government land ; that is, it is either unalienated or alienated. The

expression for unalienated land is khalsa or ryatwari in some parts as opposed to dumala or inam lands, that is, alienated lands. In Gujrat Government lands are called "sarkari" as opposed to "baharkhali" lands meaning alienated lands—lands the produce of which had not to be brought to the common threshing ground. In some parts of Gujrat there are, "talpad" (Government) lands as opposed to "Wanta" lands. In old Regulations two kinds of lands have been referred to, namely, 'malguzary land and lakhiraj land'. The former meant land paying assessment to Government, whereas the latter meant land free from payment of assessment. Khalsa land in the permanent occupation of holders was denominated, before the survey-settlements in the different parts of the Presidency by the expressions mirasi, dhara, suti and muli. Government arable land not in the permanent occupation of an occupant was and is described by the name sheri. In alienated villages lands corresponding to Government "sheri" lands are denominated by the expressions "sheri" "Khas Kamath" and "Ghar Khedu". Lands in leasehold or farmed villages are called khoti lands. Lands which are given under leases and the assessment of which is regulated by the terms thereof are called kauli lands."

It will be observed that Mirasi, Dhara, Suti and Muli were all tenures in regard to unalienated lands, the tenure holders being permanent holders of land having hereditary interests in their holdings. The Khoti tenures in the Konkan and the Bhagdari and Narvadari tenures in some parts of Gujrat were also tenures in regard to unalienated lands, the revenue being assessed on those lands on entire villages and not on specific pieces of land either in lump or on the basis of a fixed Bighoti assessment on each field and the tenure-holders being responsible for the payment of the sum in certain specified modes. The general prevailing tenure, however, was the Raiyatwari tenure where the Raiyat or the tenant had the right of an occupant in his holding. The right of an occupant was a heritable right and on the death of a registered occupant the name of his heir was entered in his place. All these were land-tenures in respect of unalienated lands and the Bombay Survey and Settlement Act (Bom. I of 1865) passed in 1865 applied generally to the same. There were of course certain Acts which dealt with specific tenures mentioned above, *e.g.*, Bhagdari and Narvadari Tenures Act (Bom. V of 1862), and Khoti Settlement Act (Bom. I of 1880) ; but by and large they were tenures in regard to unalienated lands and were governed by the Bombay Survey and Settlement Act 1865. In 1879, the State Legislature enacted the Bombay Land Revenue Code (Bom. V of 1879) with a view to consolidate and amend the law relating to Revenue Officers, to the assessment and recovery of land revenue and to other matters connected with land revenue administration. This Act extended to the whole of the State of Bombay excluding the City of Bombay and certain other areas therein mentioned. We shall have occasion to refer to certain provisions of this Act hereafter.

Turning now to alienated lands in which category were comprised lands not belonging to government and lands not paying revenue to government which were exceptions to the principles of State proprietorship and of liability of land-holders to pay land revenue to government we find that the alienations were classified as : (1) political tenures such as Jagirs and Saranjams ; (2) Service Inams ; (3) Personal Inams and (4) Religious endowments. The principal alienations were Inams, Jagirs or Saranjams and Watans. Each of them was considered as a tenure, had got its own history, its own features and peculiarities. Summary settlements were effected by the government with these tenure-holders and their rights as such recognized. There were Taluqdari tenures or estates in Gujrat which also came under this category and it may be noted that several pieces of legislation were passed by the State Legislature in regard to those several tenures of alienated lands, *e.g.*, Titles to Rent-Free Estates Act (Bom. XI of 1852) ; Ahmedabad Taluqdars Act (Bom VI of 1862) ; Bombay Hereditary Offices Act (Bom. III of 1874) ; Broach and Kaira Encumbered Estates Act (Bom. XIV of 1877); Broach and Kaira Encumbered Estates Act (Bom. XXI of 1881) ; Matadars Act (Bom. VI of 1887) and Gujrat Taluqdars Act (Bom. VI of 1888). Our attention was also drawn in this connection to the various Acts passed by the State Legislature (between 1949 and 1955) abolishing the several land tenures in Bombay where the government was not in direct contact with the tiller of the soil but there was an interposition of intermediaries between them, the intermediaries having leased out parts of the lands to the tenants who actually cultivated the soil and it was urged that the interests of these intermediaries were estates properly so called.

It is to be noticed, however, that the several land tenures which were thus abolished were not only tenures in respect of alienated lands but also comprised unalienated lands, *e.g.*, the Bombay Bhagdari and Narvadari Tenures Abolition Act, 1949 (Bom. XXXII of 1949); The Bombay Khoti Abolition Act, 1949 (Bom. VI of 1950) and the Bombay Merged Territories (Janjira and Bhor) Khoti Tenure Abolition Act, 1953 (Bom. LXXI of 1953). There was no distinction made thus between land tenures in regard to alienated lands and those in regard to unalienated lands. It may also be noted that all these Acts followed a common pattern, *viz.*, the abolition of these land tenures, award of compenation to the tenure-holders whose tenures were thus abolished and the establishment of direct relations between the government on the one hand and the tenure-holders cultivating the lands personally and the tenants cultivating the soil on the other. All these persons, thus cultivating the soil were given the status of occupants and direct relationship was thus established between the government and them. These Acts so far as our present purpose is concerned are only mentioned to show the different types of land tenures which existed in the State of Bombay prior to their abolition as aforesaid.

These were the various land tenures known in the State of Bombay and we may at this stage appropriately refer to the statisics (1886-87) of these tenures given by Baden-Powell in Vol. III of his said Book at p. 251 :

Tenure.	Number of estates or holdings.	Number of villages.	Area in acres.	Remarks.
Village landholders : Raiyatwari villages.	1,284,238	30,118 3/2	28,475,016 (occupied land only).	I have added together these paying at full rates and the much smaller number paying at privileged rates, the latter are 213,405, and how far these represent bhagdar, etc., etc., I have no means of telling.
Overlord tenures Talukdari	530½	530½	1,419,397 (gross area)	
Mewasi	41	41	79,334	
Udhad Jambandi	123	123	194,830	
Khot.	1732½	1732½	2,160,517	
Isafat.	7	7	3,608	
Revenue-free, i.e., inam and Jagir.	2165¾	2165¾	4,483,343	These refer to whole villages or estates not to revenue privileges on individual fields, etc., which are included in village land-holdings.

It is to be noted that the holdings of the land-holders in Ryatwari villages apart from others were also styled therein as estates or holdings.

It was vehemently urged before us by learned counsel for the petitioners that the expression "estate" aptly applied only to lands held by the various tenure-holders of alienated lands above referred to; and that it could not apply to the holdings of occupants who had merely a right of occupancy in specific pieces of unalienated lands. The word "estate" had been defined in the Bombay Land Revenue Code, 1879, in section 2 (5) to mean :

"Any interest in lands and the aggregate of such interests vested in a person or aggregate of persons capable of holding the same"

and would *prima facie* cover not only an interest in alienated lands but also in unalienated lands. It was, however, urged that the expression "estate" should be construed in a narrower sense having regard to the legislative history and particularly to the fact that the lands held by the tenure-holders of alienated lands only had prior to 1879 been recognized as estates and the holding of an occupant was not treated as such.

The distinction thus sought to be made between holders of unalienated lands and holders of alienated lands is not of much consequence because even in regard to unalienated lands besides the occupants there were tenure holders called Bhagdars and Narwadars and Khotes who had interests in lands held by them under those several tenures which lands were unalienated lands. The interests which these tenure holders enjoyed in the lands held by them were "estates" and it could not therefore be predicated of the expression "estate" that it could only be used in connection with alienated lands. If this distinction was therefore of no avail, we have only got to consider if there is any reason why a narrow interpretation should be put upon the expression "estate" as suggested by the petitioners. Reliance was placed by the learned counsel for the petitioners on a decision of this Court in *Hariprasad Shivshankar Shukla* v. *A. D. Divikar*[1], where the word "retrenchment" as defined in section 2 (oo) and the word "retrenchment" in section 25-F of the Industrial Disputes Act, 1947, as amended by Act XLIII of 1953 were held to have no wider meaning than the ordinary accepted connotation of those words and were held to mean the discharge of surplus labour or staff by the employer for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, and did not include termination of services of all workmen on a *bona fide* closure of industry or on change of ownership or management thereof. Even though the word "retrenchment" was defined as meaning the termination of services by an employer of the workmen for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, which words were capable of including within their scope the termination of services of all workmen on a *bona fide* closure of industry or on change of ownership or management thereof, the word "retrenchment" was construed in a narrow sense because the word "retrenchment" connoted in its ordinary acceptance that the business itself was being conducted and a portion of the staff or labour force was discharged as surplusage. This Court obsrved in the course of the judgment at page 132 :

"In the absence of any compelling words to indicate that the intention was even to include a *bona fide* closure of the whole business, it would, we think, be divorcing the expression altogether from its context to give it such a wide meaning as is contended for by learned counsel for the respondent. What is being defined is retrenchment, and that is the context of the definition. It is true that an artificial definition may include a meaning different from or in excess of the ordinary acceptation of the word which is the subject of definition ; but there must then be compelling words to show that such a meaning different from or in excess of the ordinary meaning is intended. Where, within the framework of the ordinary acceptation of the word, every single requirement of the definition clause is fulfilled, it would be wrong to take the definition as destroying the essential meaning of the word defined."

Reliance was also placed on a decision of the Court of Appeal in England in Re *The Vexatious Actions Act*, 1896 In re *Bernard Boaler*[2], where the words "legal proceedings" were held not to include criminal proceedings, in spite of the words being *prima facie* capable of including the same. Kennedy, C.J., expressed his view at page 32 that it was impossible to say that the meaning of the expression "legal proceedings" was in itself and by itself clear and unambiguous and followed the dictum of Lord Esher in *Rex* v. *City of London Court*[3]:

"If the words of an Act admit of two interpretations then they are not clear ; and if one interpretation leads to an absurdity and the other does not, the Court will conclude that the Legislature did not intend to lead to an absurdity, and will adopt the other interpretation."

Scrutton, J., also expressed the same opinion at page 41 :

"I find general words used in the Act capable of two meanings, a wider and a narrower one. On the whole I think the language is more suited to the narrower than the wider meaning. The narrower meaning will affect the liberties of the subject to some extent ; the wider meaning will most seriously affect the liberties of the subject in a matter, his personal liberty and safety, which I see no reason in the Act to believe was in the contemplation of the Legislature. I decline to make this more serious interference with the liberty of the subject, unless the Legislature uses language clear enough to convince me that that was its intention, and I think ample meaning is provided for its words, and ample remedy is provided for the grievance in respect of which Parliament was legislating by putting the narrower construction on the general words it has used."

1. (1957) S.C.J. 83 : 1957 S.C.R. 121, 132.
2. L.R. (1915) 1 K.B. 21.
3. L.R. (1892) 1 Q.B. 273, 290.

Are there any circumstances in the present case which would compel us to put a narrower construction on the expression "estate" in section 2 (5) of the Bombay Land Revenue Code, 1879? It is true that the expression "estate" was used prior to 1879 in connection with the interests which the various tenure holders of alienated lands held in their respective lands but it does not therefore follow that that expression could be used only in connection with those interests and no others. The Watandars, Saranjamdars, Inamdars and Taluqdars and the like were no doubt holders of "estates" but does that fact militate against the occupants also holding "estates" in the lands which were the subject-matter of their tenures. The words of the definition contained in section 2 (5) of the Bombay Land Revenue Code, 1879, were clear and unambiguous. They meant any interest in lands and the expression "lands" was capable of comprising within its ambit alienated and unalienated lands.

As a matter of fact, the definition of "Superior holder" in section 2 (13) and the definition of "alienated" in section 2 (20) of the Code, provisions of section 111 in regard to revenue management of villages or estates not belonging to the Government, of section 113 with regard to the partition of estates and of section 136 prescribing liability for revenue, amongst others refer not only to alienated lands but also to unalienated lands and the expression "estates" used therein can have reference not only to alienated lands but also to unalienated lands. If the definition of the expression "estate" in the context of the Code is thus clear and unambiguous as comprising both the types of lands, there is no reason why a narrower construction as suggested by the petitioners should be put upon the expression "estate". (See the observations of Kennedy, L.J. in *Vexatious Actions Act,* 1896, In re : *Boaler* (*supra*)[1] at page 31 and the observations of this Court in *Raja Sri Sailendra Narayan Bhanja Deo* v. *The State of Orissa*[2]. Even if there was any ambiguity in the expression, the wider significance should be adopted in the context of the objectives of the Act as stated above.

We are, therefore, of opinion that the expression "estate" had the meaning of any interest in land and it was not confined merely to the holdings of landholders of alienated lands. The expresssion applied not only to such "estate" holders but also to landholders and occupants of unalienated lands.

It was however contended on behalf of the petitioners that the Bombay Land Revenue Code was not a law relating to land tenures in force in the State of Bombay and therefore the definition of the expression "estate" contained therein would not avail the respondent. It was urged that the Code was passed by the State Legislature in order to consolidate and amend the law relating to Revenue Officers, and to the assessment and recovery of Land Revenue, and to other matters connected with the Land Revenue Administration in the Presidency of Bombay and was merely concerned with the collection of land revenue by the State and had nothing to do with land tenures as such. This argument, however, ignores the various provisions of the Code which define the status as also the rights and obligations of the ocupant who has been defined in section 2 (16) of the Code to mean the holder in actual possession of unalienated lands other than a tenant provided that where the holder in actual possession is a tenant, the landholder or superior landlord, as the case may be, shall be deemed to be the occupant. Chapter VI deals with the Grant, Use and Relinquishment of unalienated lands and section 65 thereof prescribes the uses to which an occupant of land for purposes of agriculture may put his land. Under section 68 an occupant is entitled to the use and occupation of his land for the period therein prescribed on fulfilling the conditions therein mentioned and under section 73 occupancy is stated to be transferable and heritable. Section 73 as it was enacted in 1879 read as follows :

"The right of occupancy shall, subject to the provisions contained in section 56, and to any conditions lawfully annexed to the occupancy and save as otherwise prescribed by law, be deemed an heritable and transferable property."

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1. L.R. (1915) 1 K.B. 21.
2. (1956) S.C.J. 449 : 1956 S.C.R. 72.

Certain amendments have been made in this section by various Bombay Land Revenue Amendment Acts (Bom. VI of 1901 and Bom. IV of 1913) and the section as it stands at present reads :

"An occupancy shall, subject to the provisions contained in section 56, and to any conditions lawfully annexed to the tenure, and save as otherwise prescribed by law, be deemed an heritable and transferable property."

This goes to show that an occupant holds the land under a tenure and occupancy is a species of land tenures. The provisions contained in section 73(A) relating to the power of the State Government to restrict the right of transfer and the provisions in regard to relinquishments contained in sections 74, 75 and 76 also point to the same conclusion. These and similar provisions go to show that occupancy is one of the varieties of land tenures and the Bombay Land Revenue Code, 1879, comes within the description of "existing laws relating to land tenures in force" in the State of Bombay within the meaning of Article 31-A (2) (*a*). Baden-Powell has similar observations to make in regard to these provisions in his Land Systems in British India, Vol. 1, at page 321 :

"Nothing whatever is said in the Revenue Code about the person in possession (on his own account) being "owner" in the Western sense, He is simply called the "occupant", and the Code says what he can do and what he cannot. The occupant may do anything he pleases to improve the land, but may not without permission do anything which diverts the holding from agricultural purposes. He has no right to mines or minerals.

These are the facts of the tenure; you may theorize on them as you please ; you may say this amounts to proprietorship, or this is a dominium minus plenum ; or anything else."

There is no doubt therefore that the Bombay Land Revenue Code, 1879 was an existing law relating to land tenures in force in Bombay at the time when the Constitution (Fourth Amendment) Act, 1955, was passed and Article 31-A in its amended form was introduced therein and the expression "estate" had a meaning given to it under section 2 (10) there *viz.*, "any interest in land" which comprised within its scope alienated as well as unalienated lands and covered the holdings of occupants within the meaning thereof.

The 1948 Act was passed by the State Legislature in order to amend the law which governed the relations between landlords and tenants of agricultural lands the object sought to be achieved being as hereinbefore set out. Section 2 of the Act defined the expressions "to cultivate personally" (section 2 (6)) ; "landholder" (section 2, (9)) ; "protected tenant" (section 2 (14)) amongst other expressions and provided in section 2 (21) that words and expressions used in this Act but not defined shall have the meaning assigned to them in the Bombay Land Revenue Code, 1879, and the Transfer of Property Act, 1882, as the case may be. This brought in the definition of the expression " estate " which had the meaning assigned to it in that Code, *viz.*, " any interest in land." The expression " landholder " in section 2 (9) above was defined to mean " a zamindar, jagirdar, saranjamdar, inamdar, talukdar, malik or a khot or any person not hereinbefore specified who is a holder of land or who is interested in land, and whom the State Government has declared on account of the extent and value of the land or his interests therein to be a landholder for the purposes of this Act." The latter part of this definition is significant and shows that not only holders of alienated lands but also holders of unalienated lands were comprised therein provided, however, the extent and value of the land or their interests therein were such as to deserve a declaration in that behalf at the hands of the State Government. The only point to note here is that no distinction was made even in this Act between alienated lands and unalienated lands and all interests in land howsoever acquired were treated on a par so far as the holdings were concerned, necessarily implying that even an occupant would come within the description of landholder and his interests therein would come within the definition of " estate " as defined in the Bombay Land Revenue Code, 1879. Chapter III made provisions for protected tenants, their special rights and privileges and whoever came within the category of protected tenant was given the right to purchase from the landlord the land held by him as such protected tenant notwithstanding anything contrary in law, usage or contract subject to the provisions of

sub-section 6 which imposed restrictions on the holdings of landlords as well as tenants. These provisions were analogous to the provisions contained in sections 32 to 32 R of the impugned Act except that in the 1948 Act the protected tenant had the option to purchase the land whereas under the impugned Act there was a provision for compulsory purchase of the land by the tenant on a specified date subject to certain conditions therein mentioned. Section 34 of the 1948 Act gave the landlord the right to determine protected tenancy under certain conditions and was analogous to section 31 of the impugned Act which empowered the landlord to terminate the tenancy for personal cultivation and non-agricultural purposes. 50 acres of land were prescribed as the limit of the holding either by the landlord or the protected tenant which provision was analogous to the one found in the impugned Act in regard to ceiling area and economic holdings. Power was given to the State Government under section 36 to reduce the limit of 50 acres by a notification in the official gazette and power was also given similarly to direct that the limits of fifty acres or the reduced limit specified in such notification shall comprise such kind or kinds of lands in the area as may be specified in the notification. This power was analogous again to the power given to the State Government under section 7 of the impugned Act to vary the ceiling area or economic holding originally prescribed in sections 5 and 6 of the Act.

These instances culled out from some of the provisions of the 1948 Act go to show that the agrarian reform which was initiated by that Act was designed to achieve the very same purpose of distribution of the ownership and control of agricultural lands so as to subserve the common good and eliminate the concentration of wealth to the common detriment which purpose became more prominent when the Constitution was ushered in on January 26, 1950 and the directive principles of State Policy were enacted inter *alia* in Articles 38 and 39 of the Constitution. With the advent of the Constitution these provisions contained in the 1948 Act required to be tested on the touch-stone of the fundamental rights enshrined in Part III thereof and when the Constitution (First Amendment) Act, 1951, was passed introducing Articles 31-A and 31-B in the Constitution, care was taken to specify the 1948 Act in the Ninth Schedule so as to make it immune from attack on the score of any provision thereof being violative of the fundamental rights enacted in Part III of the Constitution. The 1948 Act was the second item in that schedule and was expressly saved from any attack against the constitutionality thereof by the express terms of Article 31-B.

The impugned Act which was passed by the State Legislature in 1956 was a further measure of agrarian reform carrying forward the intentions which had their roots in the 1948 Act. Having regard to the comparison of the various provisions of the 1948 Act and the impugned Act referred to above it could be legitimately urged that if the cognate provisions of the 1948 Act were immune from attack in regard to their constitutionality, on a parity of reasoning similar provisions contained in the impugned Act, though they made further strides in the achievement of the objective of a socialistic pattern of society would be similarly saved. That position, however, could not obtain because whatever amendments were made by the impugned Act in the 1948 Act were future laws within the meaning of Article 13(2) of the Constitution and required to be tested on the self-same touchstone. They would not be in terms saved by Article 31-B and would have to be secrutinized on their own merits before the Courts came to the conclusion that they were enacted within the constitutional limitations. The very terms of Article 32-B envisaged that any competent legislature would have the power to repeal or amend the Acts and the Regulations specified in the 9th Schedule thereof and if any such amendment was ever made the vires of that would have to be tested. (Vide *Abdul Rahiman Jamaluddin Hurjuk* v. *Vithal Arjun Undare*[1].

That brings us back to the provisions of Article 31-A and to a consideration as to whether the impugned Act was a legislation for the acquisition by the State

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1. (1957) 59 Bom.L.R. 579.

of any estate or of any rights therein or the extinguishment or modification of any such rights within the meaning of sub-article (1) (*a*) thereof. We have already held that the Bombay Land Revenue Code, 1879, was an existing law relating to land tenures in force in the State of Bombay and that the interests of occupants amongst others fell within the expression " estate " contained therein. That, however, was not enough for the petitioners and it was further contended on their behalf that even though the impugned Act may be a law in regard to an " estate " within the meaning of the definition contained in Articles 31-A (2) (*a*) it was not law providing for the acquisition by the State of any estate or any rights therein or for the extinguishment or modification of any such rights. The impugned Act was certainly not a law for the acquisition by the State of any estate or of any rights therein because even the provisions with regard to the compulsory purchase by tenants of the land on the specified date transferred the title in those lands to the respective tenants and not to the State. There was no compulsory acquisition of any " estate " or any rights therein by the State itself and this provision could not help the respondent. The respondent, however, urged that the provisions contained in the impugned Act were enacted for the extinguishment or modification of rights in " estates " and were therefore, saved by Article 31-A (1) (*a*). It was on the other hand urged by the petitioners (1) that the extinguishment or modification of any such rights should only be in the process of the acquisition by the State of any estate or of any rights therein and (2) that the provisions in the impugned Act amounted to a suspension of those rights but not to an extinguishment or modification thereof. We shall now proceed to examine these contentions of the petitioners.

Article 31-A (1) (*a*) talks of two distinct objects of legislation ; one being the acquisition by the State of any estate or of any rights therein and the other being the extinguishment or modification of any such rights. If the State acquires an estate or any rights therein that acquisition would have to be a compulsory acquisition within the meaning of Article 31-A (1) (*a*) which was also introduced in the Constitution by the Constitution (Fourth Amendment) Act, 1955, simultaneously with Article 31-A (1) thereof. There was no provision made for the transfer of the ownership of any property to the State or a Corporation owned or controlled by the State with the result that even though these provisions deprived the landholders of their property they did not amount to a compulsory acquisition of the property by the State. If this part of Article 31A (1) (*a*) is thus eliminated what we are left with is whether these provisions of the impugned Act provided for an extinguishment or modification of any rights in "estates". That is a distinct concept altogether and could not be in the process of acquisition by the State of any " estate " or of any rights therein. Acceptance of the interpretation which is sought to be put upon these words by the petitioners would involve the addition of words " in the process of the acquisition by the State of any estate or of any rights therein " or "in the process of such acquisition " which according to the well-known canons of construction cannot be done. If the language of the enactment is clear and unambiguous it would not be ligitimate for the Courts to add any words thereto and evolve therefrom some sense which may be said to carry out the supposed intentions of the legislature. The intention of the Legislature is to be gathered only from the words used by it and no such liberties can be taken by the Courts for effectuating a supposed intention of the Legislature. There is no warrant at all, in our opinion, for adding these words to the plain terms of Article 31-A (1) (*a*) and the words ' extinguishment or modification of any such rights " must be understood in their plain grammatical sense without any limitation of the type suggested by the petitioners.

It, therefore, remains to consider whether the relevant provisions of the impugned Act were designed to bring about an extinguishment or modification of the landlord's rights in their " estate ". These provisions are contained in sections 32 to 32 R of the impugned Act and are under the heading " Purchase of lands by Tenants ". Section 32 provides that " on the first day of April 1957 (hereinafter referred to as " the tillers day ") every tenant shall, subject to the provisions of the next succeeding sections, be deemed to have purchased from his landlord,

free of all incumbrances subsisting thereon on the said day, the land held by him as tenant. . . ." provided certain conditions are fulfilled. Under section 32-A the tenant shall be deemed to have purchased the lands up to the ceiling area and the tenant shall not be deemed to have purchased lands held by him as such tenant if he hold lands partly as owner and partly as tenant but the area of the land held as owner is equal to or exceeds the ceiling area (S. 32-B). Section 32-C empowers the tenant to choose the land to be purchased if he holds lands separately from more than one landlord and in spite of anything contained in the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (Bom. Act LXII of 1947) the tenant shall be deemed to have purchased even such fragments of the land held on tenancy (S. 32-D). The balance of any land after the purchase by the tenant as above is to be disposed of as if it were land surrendered by the tenant S. 32 E) ; and the right of the tenant to purchase such land where the landlord is a minor, or a widow, or a person subject to any mental or physical disability or a serving member of the armed forces is postponed till one year after the cessation of disability. The price to be paid by the tenant is to be determined by the Tribunal as soon as may be after the tiller's day and the Tribunal is in the first instance to record in the prescribed manner the statement of the tenant whether he is willing or is not willing to purchase the land held by him as a tenant and if the tenant fails to appear or makes a statement that he is not willing to purchase the land, the Tribunal is to declare by an order in writing that such tenant is not willing to purchase the land and that the purchase is ineffective (S. 32G). These provisions also apply to a sub-tenant of a permanent tenant who is deemed to have purchased the land subject to the conditions specified in sections 32 to 32-E (S. 32-I). S. 32-J provides for an appeal to the State Government against the decision of Tribunal. Section 32-K prescribes the mode of payment of price by the tenant ; and the purchase price is recoverable as arrears of land revenue (S. 32-L). Under section 32-M on the deposit of the price in lump sum or of the last instalment of such price, the Tribunal is to issue a certificate of purchase to the tenant in respect of the land, which certificate of purchase shall be conclusive evidence of purchase. If a tenant fails to pay the lump sum within the period prescribed or is at any time in arrears of four instalments the purchase is to be ineffective and the land is to be at the disposal of the Collector and any amount deposited by such tenant towards the price of the land is to be refunded to him. Section 32-N gives the landlord a right to recover rent when purchase becomes ineffective, as if the land had not been purchased at all. Section 32-P gives the power to the Collector to resume and dispose of land not purchased by tenants. The amount of purchase price is to be applied towards satisfaction of debts (S. 32 Q) ; and the purchaser is to be evicted from the land purchased by him as aforesaid if he fails to cultivate the land personally (S. 32-R).

It is argued on the strength of these provisions that there is no effective purchase or effective sale of the land between the landlord and the tenant on the tiller's day or the alternative period prescribed in that behalf until certain conditions are fulfilled. To start with it is only an inchoate right which is given to the tenant to purchase the land which he can perfect on a statement being made by him before the Tribunal that he is willing to purchase the land. Even if he does so, the land does not vest in him because only on the payment of the purchase price either in lump or by instalments can he get the certificate of purchase from the Tribunal. If he commits default in payment, the purchase is ineffective and he gets no title to the land. These provisions, it is submitted, do not vest the title to the land in the tenant at all until all these conditions are fulfilled and if any one or more of them is not fulfilled the purchase becomes ineffective—in fact it is no purchase at all—with the result that the title to the land which is already vested in the landlord is not at all transferred to the purchaser. If that is so, there is no compulsory sale or compulsory purchase of the land in question on the tiller's day or the alternative period of time prescribed therefor and there is no extinguishment of the rights of the landlord. His rights in the land are merely suspended and such suspension is certainly not an extinguishment of his rights therein nor a modification thereof with the mea-

ning of the expression used in Article 31-A (1) (*a*). Reliance is placed in support of this proposition on the observations of this Court in *Thakur Raghubir Singh* v. *Court of Wards, Ajmer*[1]. In that case this Court considered the provisions of section 112 of the Ajmer Tenancy and Land Records Act (XLII of 1950) which provided that if a landlord habitually infringes the rights of a tenant under the Act he would be deemed to be a landlord who is disqualified to manage his own property and his property would be liable to be taken under the superintendence of the Court of Wards. Mahajan, J. (as he then was) observed at page 1055 :—

"Section 112 of the Act XLII of 1950, intended to regulate the rights of landlords and tenants, is obviously not a law providing for "the acquisition by the State" of the estates of the landlords, or of any rights in those estates. It is also not a law providing for the extinguishment or modification of any such rights. The learned Attorney-General laid emphasis on the word "modification" used in Article 31-A. That word in the context of the article only means a modification of the proprietary right of a citizen like an extinguishment of that right and cannot include within its ambit a mere suspension of the right of management of estate for a time, definite or indefinite."

These observations were confined to suspension of the right of management of the estate and not to a suspension of the title to the estate. Apart from the question whether the suspension of the title to the estate for a time, definite or indefinite would amount to a modification of a right in the estate within the meaning of Article 31-A (1)(*a*), the position as it obtains in this case is that there is no suspension of the title of the landlord at all. The title of the landlord to the land passes immediately to the tenant on the tiller's day and there is a completed purchase or sale thereof as between the landlord and the tenant. The tenant is no doubt given a *locus penitentiae* and an option of declaring whether he is or is not willing to purchase the land held by him as a tenant. If he fails to appear or makes a statement that he is not willing to purchase the land, the Tribunal shall by an order in writing declare that such tenant is not willing to purchase the land and that the purchase is ineffective. It is only by such a declaration by the Tribunal that the purchase becomes ineffective. If no such declaration is made by the Tribunal the purchase would stand as statutorily effected on the tiller's day and will continue to be operative, the only obligation on the tenant then being the payment of price in the mode determined by the Tribunal. If the tenant commits default in the payment of such price either in lump or by instalments as determined by the Tribunal, section 32-M declares the purchase to be ineffective but in that event the land shall then be at the disposal of the Collector to be disposed of by him in the manner provided therein. Here also the purchase continues to be effective as from the tiller's day until such default is committed and there is no question of a conditional purchase or sale taking place between the landlord and tenant. The title to the land which was vested originally in the landlord passes to the tenant on the tiller's day or the alternative period prescribed in that behalf. This title is defeasable only in the event of the tenant failing to appear or making a statement that he is not willing to purchase the land or committing default in payment of the price thereof as determined by the Tribunal. The tenant gets a vested interest in the land defeasable only in either of those cases and it cannot therefore be said that the title of landlord to the land is suspended for any period definite or indefinite. If that is so, there is an extinguishment or in any event a modification of the landlord's right in the estate well within the meaning of those words as used in Article 31-A (1) (*a*).

We have, therefore, come to the conclusion that the impugned Act is covered by Article 31-A and is protected from attack against its constitutionality on the score of its having violated the fundamental rights, enshrined in Articles 14, 19, and 31 of the Constitution. That being so, the attack levelled against sections 5, 6, 8, 9, 17-A, 31-A to 31-D and 32 to 32-R on the score of their being violative of the fundamental rights conferred upon the petitioners is of no avail to the petitioners. This being the true position it is not necessary for us to consider the interesting questions which were argued before us at some length, *viz.*, the nature, scope

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1. 1953 S.C.J. 505 : 1953 S.C.R. 1049.

and extent of the provisions contained in Articles 31 (1) and 31 (2) of the Constitution and the line of demarcation between them as also the impact of Article 31 (1) on the fundamental right enshrined in Article 19 (1) (*f*) of the Constitution. Suffice it to say that under the circumstances no fundamental right of the petitioners before us is infringed by the impugned Act or the provisions thereof and the petitions under Article 32 cannot be sustained.

The impugned Act being within the legislative competence of the State Legislature, no question as to its being a piece of colourable legislation can arise. It is not a legislation resorted to by the State Legislature with a view to by-pass the provisions of List II of the seventh schedule to the Constitution, attempting to do something which it was otherwise not competent to do. The legislation being covered by Entry 18 of the said List is really a further measure for agrarian reform which it was well within its competence to enact. It is not an expropriatory legislation in the guise of one covered by Entry 18 in the said List. It only fixes the ceiling area for the holding of the landlord cultivating the land personally and transfers the excess holding to the tenant in actual cultivation thereof and there too the price of the land as fixed by the Tribunal has got to be paid by the tenant to the landlord. The tenant also is not entitled to hold land beyond the ceiling area and there is a balance sought to be struck between the interests of the landlord and those of the tenants so that the means of production are not concentrated in the hands of one party to the common detriment. The price payable is also either in lump or in such instalments as may be determined by the Tribunal and on default committed by the tenant in payment thereof the purchase becomes ineffective and the land deemed to have been purchased by the tenant reverts to the Collector to be dealt with in accordance with the provisions contained in the Act in that behalf. It may be that instalments may be spread over a particular period which may thus be determined by the Tribunal and unless default is committed by the tenant in payment of four instalments the purchase does not become ineffective. That, however, is not a provision which makes the payment of price in any manner illusory. The landlord is entitled to the rents of the land as if there had been no purchase of the land by the tenant and the payment of such rent is made the first charge on the land. There is, therefore, no scope for the argument that the provisions in this behalf contained in the Act were illusory or that the impugned Act is a piece of colourable legislation.

The only question that now survives is whether section 7 of the impugned Act is bad by reason of excessive delegation of legislative power. Section 7 invests the Government with the power to vary the ceiling area and economic holding which have been prescribed in sections 5 and 6 of the Act. Sections 5, 6 and 7 of the Act read as under :—

"5. *Ceiling area* :—(1) For the purposes of this Act, the ceiling area of land shall be—

(*a*) 48 acres of jirayat land, or

(*b*) 24 acres of seasonally irrigated land or paddy or rice land, or

(*c*) 12 acres of perennially irrigated land.

(2) Where the land held by a person consists of two or more kinds of land specified in sub-section (1), the ceiling area of such holding shall be determined on the basis of one acre of perennially irrigated land being equal of two acres of seasonally irrigated land or paddy or rice land, or four acres of jirayat land.

6. *Economic holding*.—(1) For the purposes of this Act an economic holding shall be—

(*a*) 16 acres of jirayat land, or

(*b*) 8 acres of seasonally irrigated land, or paddy or rice land, or

(*c*) 4 acres of perennially irrigated land.

(2) Where the land held by a person consists of two or more kinds of land specified in sub-section (1) an economic holding shall be determined on the basis applicable to the ceiling area under sub-section (2) of section 5.

7. *Power of Government to vary ceiling area and economic holding* :—Notwithstanding anything contained in sections 5 and 6, it shall be lawful for the State Government, if it is satisfied that it is expedient so to do in the public interest, to vary, by notification in the Official Gazette, the acreage of the ceiling

area or economic holding, or the basis of determination of such ceiling area or economic holding under sub-section (2) of section 5, regard being had to—

(*a*) the situation of the land,

(*b*) its productive capacity,

(*c*) the fact that the land is located in a backward area, and

(*d*) any other factors which may be prescribed."

It is contended that section 7 does not fix any criteria for the guidance of the State Government and that the power which is given to the State Government to vary the ceiling area and economic holding is unguided and unfettered and that it is possible to exercise it at the sweet will and discretion of the State Government even in favour of a single individual or in favour of political sufferers and the like. It is urged that no broad principle or policy is enunciated by the Legislature in this behalf and it would be open to the State Government to exercise this power arbitrarily and even in a discriminatory manner and that such entrustment of power to the State Government amounts to excessive delegation of legislative power and section 7 therefore must be held to be void.

The principles by which the Courts are guided in the determination of this question are now well settled. In the *State of Bihar* v. *Maharajadhiraja Sir Kameshwar Singh of Darbhanga*[1], Mahajan, J., (as he then was observed) :—

"The legislature applied its mind to the question of the method and manner of payment of compensation. It settled its policy and the broad principles. It gave the State Government the power to determine matters of detail after having settled vital matters of policy. It cannot be said that the legislature did not apply its mind to the subject-matter of the legislation and did not lay down a policy. The proportion in which compensation was payable in cash or in bonds or whether the whole of it was to be paid in cash is a matter which only the State Government could fix and similarly the interval of instalments and the period of redeemability of the bonds were also matters of detail which the executive could more appositely determine in exercise of its rule-making power. It cannot be said in this case that any essential legislative power has been delegated to the executive or that the legislature did not discharge the trust which the Constitution had reposed in it. If the rule-making authority abuses its power or makes any attempt to make the payment illusory the expropriated proprietor will not be without a remedy."

If the legislature settles the policy and the broad principles of legislation, there is no bar against leaving the matters of detail to be fixed by the executive and such delegation will not amount to excessive delegation of legislative power such as to vitiate the enactment. In the case before us the preamble to Act says what the policy of the impugned Act is, *viz.*, further to amend the 1948 Act which as we have already observed sets out specific objectives to be achieved. Sections 5 and 6 prescribe the ceiling area and the economic holding which are fixed by the legislature itself having regard to the normal conditions then prevailing within the State. The legislature knew what were the different types of land, their situation and productive capacity and having regard to all the relevant factors determined the ceiling area as also the economic holding. There were, however, bound to be differences between district and district and one part of the State and another and having therefore enunciated the broad principles and policy which were embodied in sections 5 and 6 of the Act the legislature enacted section 7 empowering the State Government to vary the ceiling area and the economic holding if it was satisfied that it was expedient so to do in the public interest, regard being had to the various criteria therein specified. The State Government was to be guided in arriving at its satisfaction in regard to the expediency thereof by (*a*) the situation of the land, (*b*) its productive capacity, (*c*) the fact that the land is located in a backward area, and (*d*) any other factors which may be prescribed. In so far as the situation of the land and its productive capacity were variable factors, more so if the land was located in a backward area, the State Government was enjoined to have regard to these factors as determining the variations one way or the other from the normal standard adopted by the Legislature in sections 5 and 6 of the Act. " Any other factors which may be prescribed " would be factors *ejusdem generis* to the factors mentioned earlier in the section and could not be any and every factor which crossed

1. 1952 S.C.J. 354: 1952 S.C.R. 889, 954.

the mind of the executive. The very terms of the section preclude any single individual being treated in this manner because it talks of the variation in the ceiling area and the economic holding being considered by the State Government to be expedient in the public interest and the satisfaction of any individual interest could hardly be said to be a matter of public interest. No doubt individuals would be benefited by the variations contemplated in section 7 but for that purpose the State Government has got to be satisfied that it is expedient in the public interest to do so and no variation in regard to ceiling area or the economic holding of a single individual can ever be said to have been contemplated within the terms of section 7. It appears however that this argument found favour with the Bombay High Court in its decision in *Parashram Damodhar* v. *State of Bombay*[1], where the Court observed that the power to issue a notification may be exercised in favour of a single individual under the authority reserved under section 7 and may lay the State Government open to a charge of favouritism. With great respect to the learned Judges of that High Court, we are of the view that no such thing is ever contemplated in the terms of section 7 of the Act. There is also no warrant for the suggestion that the State Government might vary the ceiling area and the economic holding, say for instance, for benefiting the political sufferers within the State. If the situation of the land and its productive capacity as also the fact that the land is located in a backward area are the criteria to be determined before the State Government is satisfied that it is expedient to vary the ceiling area and the economic holding in the public interest and " any other factors which may be prescribed " are to be read *ejus dem generis* with the above as already observed, no question of benefiting political sufferers can ever enter into the picture. That would be an extraneous consideration. It does not come within the criteria specified in section 7 of the Act on a true construction thereof. Such considerations therefore do not militate against the validity of the provisions contained in that section. In our opinion, the broad principles and policy have been laid down by the legislature, the criteria have been fixed according to which the State Government has to be satisfied that it is expedient to vary the ceiling area and economic holding already prescribed by the legislature and the mere matter of working out the details having regard to those criteria which are specifically mentioned therein which has been delegated to the State Government does not amount to any excessive delegation of legislative power.

It is also to be remembered that this power of variation of the ceiling area and the economic holding is vested in the State Government and is left to its subjective satisfaction having regard to the criteria therein specified. As was observed by Kania, C.J., in *Dr. N. B. Khare* v. *The State of Delhi*[2] :—

"This whole argument is based on the assumption that the Provincial Government when making the order will not perform its duty and may abuse the provisions of the section. In my opinion, it is not proper to start with such an assumption and decide the legality of an Act on that basis. Abuse of the power given by a law sometimes occurs ; but the validity of the law cannot be contested because of such an apprehension."

These observations of Kania, C.J., were quoted with approval by Patanjali Sastri, C.J., in *The State of West Bengal* v. *Anwar Ali Sarkar*[3], where it was stated :—

"Whether a law conferring discretionary powers on an administrative authority is constitutionally valid or not should not be determined on the assumption that such authority will act in an arbitrary manner in exercising the discretion committed to it."

The above observations of Kania, C.J., were then quoted and the judgment proceeded :—

" On the contrary, it is to be presumed that a public authority will act honestly and reasonably in the exercise of its statutory powers, ..."

We may lastly refer to the observations of this Court in *Pannalal Binjraj* v. *Union of India*[4] :—

" It may also be remembered that his power is vested not in minor officials but in top-ranking authorities like the Commissioner of Income-tax and the Central Board of Revenue who act on the

1. A.I.R. 1957 Bom. 252.
2. 1950 S.C.J. 328 : (1950) S.C.R. 519, 526.
3. 1952 S.C.J. 55 : 1952 S.C.R. 284, 301.
4. (1957) S.C.R. 233, 257, 258.

information supplied to them by the Income-tax Officers concerned. This power is discretionary and not necessarily discriminatory and abuse of power cannot be easily assumed where the discretion is vested in such high officials. (Vide *Matajog Dobey* v. *H. S. Bhari*[1]). There is moreover a presumption that public officials will discharge their duties honestly and in accordance with the rules of law (Vide *People of the State of New York* v. *John E. Van De Carr, etc.*[2]). It has also been observed by this Court in *A. Thangal Kunju Musaliar* v. *M. Venkitachalam Potti*[3] with reference to the possibility of discrimination between assessees in the matter of the reference of their cases to the Income-tax Investigation Commission that " it is to be presumed, unless the contrary were shown, that the administration of a particular law would be done "not with an evil eye and unequal hand" and the selection made by the Government of the cases of persons to be referred for investigatin by the Commission would not be discriminatory."

This presumption, however, cannot be stretched too far and cannot be carried to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminatory treatment (vide *Gulf, Colarado, etc.* v. *W.H. Ellis*[4]). There may be cases where improper execution of power will result in injustice to the parties. As has been observed, however, the possibility of such discriminatory treatment cannot necessarily invalidate the legislation and where there is an abuse of such power, the parties aggrieved are not without ample remedies under the law (vide *Dinabandhu Sahu* v. *Jadumony Mangaraj*[5]). What will be struck down in such cases will not be the provision which invests the authorities with such power but the abuse of the power itself."

It, therefore, follows that section 7 of the Act cannot be impugned on the ground of execessive delegation of legislative power.

All the various contentions urged by the petitioners therefore fail and the result is that the petitions filed by the petitioners before us must be dismissed with costs. The State of Bombay which is the only respondent in all these petitions will however get only one set of costs therein.

Petitions dismissed.

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—J. L. KAPUR AND K. N. WANCHOO, JJ.

Faguna Kanta Nath .. *Appellant**

v.

The State of Assam ... *Respondent.*

Penal Code (XLV of 1860), section 165-A—K charged for offence under section 161—F charged for abetment of the said offence—K acquitted—F if can be convicted for abetment.

Under section 165-A of the Penal Code (XLV of 1860) for a person to be guilty of abetment of an offence under section 161 of that Code, it is not necessary that the offence should have been committed ; but the requirements of section 107 must be statisfied.

Where on the findings of trial Court *F* the appellant merely received the money for and on behalf of *K* and the evidence of the complainanat is that *K* had asked him to hand over the money to *F* for counting and where it is not the case of the prosecution, that the appellant instigated *K* to demand illegal gratification or that the appellant entered into a conspiracy with *K* for the commission of the offence under section 161, then, if *K* is acquitted and therefore the offence under section 161 is held not to have been comitted and therefore no question of intentionally aiding by any act or omission in the commission of the offence arises, the conviction of the appellant for abetment cannot be upheld.

Appeal by Special Leave from the Judgment and Order, dated the 14th December, 1955, of the Assam High Court at Gauhati, in Criminal Appeal No. 54 of 1955, arising out of the Judgment and Order, dated the 23rd May, 1955, of the Court of the Special Judge, Lower Assam District at Dhubri, in Special Case No. 2 of 1954.

Nur-ud-Din Ahmad and *K. R. Chaudhury*, Advocates, for Appellant.

Naunit Lal, Advocate, for Respondent.

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1. 1956 S.C.J. 110 : (1956) 1 M.L.J. (S.C.) 79 : 1956 An.W.R. (S.C.) 79 : (1955) 2 S.C.R. 925, 932.
2. 1950-310-199 U. S. 552: 50 L.Ed. 305.
3. 1956 S.C.J. 323: (1955) 2 S.C.R. 1196.
4. (1897) 165 U.S. 150 : 41 L.Ed. 666.
5. (1955) 1 S.C.R. 140, 146.

* Crl. Appeal No. 203 of 1956. 13th January, 1959.

The Judgment of the Court was delivered by

Kapur, J.—This appeal by Special Leave is directed against the judgment and order of the High Court of Assam. The appellant before us was tried for an offence under section 165-A of the Indian Penal Code for having abetted one Khalilur Rahman in the commission of an offence by the latter under section 161, Indian Penal Code. Both the appellant and Khalilur Rahman were convicted of the offences with which they were charged and sentenced to one year's rigorous imprisonment. On appeal the High Court acquitted Khalilur Rahman but maintained the conviction and sentence of the appellant.

The facts of this appeal are that on May 9, 1952, the complainant Narendra Nath Brahma was taking two carts carrying 25 Mds. of paddy for sale to Billashiparabazar along the path which runs by the side of the river of Gauranga. When he had gone only a short distance he was stopped by the paddy-checking Inspector, Khalilur Rahman, who was accompanied by the appellant and three others. Khalilur Rahman demanded Rs. 200 as bribe and threatened the complainant that unless the amount demanded was paid his cart and paddy would be seized. In this he was supported by the appellant and three others. The complainant expressed his inability to give that much amount but ultimately he agreed to pay Rs. 150. He borrowed Rs. 100 from one Surajmal Oswal out of which he offered Rs. 80 to Khalilur Rahman who asked him to hand them over to the appellant who counted the money and made it over to Khalilur Rahman. The complainant was also forced to execute a promissory note for a sum of Rs. 70 in favour of the appellant and he promised that the money would be paid the following day after the paddy was sold. The complainant learnt in the bazar that another person Happaram Rai had been similarly treated but he had only paid Rs. 15. On May 11, 1952, the complainant approached the appellant for the refund of his money and the return of his pronote and although the appellant promised he did not do so. The same day there was a meeting at Futkibari Middle English School where the Deputy Commissioner was present. The complainant presented to him a written complaint describing how he was forced to pay Rs. 80 and made to execute a pronote for Rs. 70. Thereupon both Khalilur Rahman and the appellant were prosecuted, the former under section 161, Indian Penal Code read with section 5 (2) of the Prevention of Corruption Act, 1947 (II of 1947) and the latter under section 165-A and they were convicted and sentenced by the Special Judge as already stated.

The evidence of the complainant was that before Rs. 200 was demanded from him, the appellant and Khalilur Rahman "went aside" and had some talks and coming together accused Khalilur Rahman demanded Rs. 200. He also stated :

"I told them that I managed to procure Rs. 80 somehow and I wanted to hand over to accused Khalilur Rahman who directed me to hand over to accused Faguna, saying he would take counting, accused Faguna counted the money and then made over the entire money to accused Khalilur Rahman saying that Rs. 80 would not do and I should execute a handnote for the balance of Rs. 70 promising to pay on the following Saturday".

According to the complainant it was Khalilur Rahman who tore out a page from his note book and handed over the same to the complainant and also lent him his fountain pen and after the pronote was executed both the pen and the pronote were handed over to Khalilur Rahman. The Special Judge found :—

"I am fully convinced that a sum of Rs. 80 was realised from the complainant for forbearing from seizing of the paddy by the accused Khalilur Rahman, being helped and abetted by the accused Faguna Kanta Nath."

He therefore convicted Khalilur Rahman under section 161, Indian Penal Code, but acquitted him of an offence under section 5 (2) of the Prevention of Corruption Act (Act II of 1947) and convicted the appellant for abetment of that offence On appeal Deka, J., held that from the complaint made by the complainant it was not clear that any payment was made to Khalilur Rahman. He said :

"It may be that Khalilur Rahman was a party to squeezing out some money from a dealer in paddy who tried to evade the law, but that falls far short of proving that he had accepted the money through Faguna Kanta Nath as alleged now in Court."

The learned Judge accepted the complainant's story that money was paid to the appellant but he was of the opinion that the evidence was not strong enough to prove payment to Khalilur Rahman and therefore he was "prepared to give the benefit of doubt to Khalilur Rahman and direct that his conviction under section 161, Indian Penal Code, be set aside". As to the appellant he was of the opinion that money was taken by him for payment to Khalilur Rahman as illegal gratification and whether he actually paid it to him or not the offence fell under section 165-A and therefore he held the appellant guilty under that section. Thus pccording to the learned Judge the case against Khalilur Rahman was not proved and as money had been paid to the appellant he was guilty of abetment under section 165-A, Indian Penal Code. The appellant has come to this Court by Special leave.

The main argument raised on behalf of the appellant is that as Khalilur Rahman has been acquitted, on the facts and circumstances of this case the conviction of the appellant for abetment cannot be sustained. The evidence of the complainant on which the conviction is based was that the money was demanded by Khalilur Rahman and at his instance it was made over to the appellant who counted the money and handed it over to Khalilur Rahman. The pronote was also written as the instance of Khalilur Rahman and was handed over to him. The part played by the appellant according to the story of the complainant was that before the demand of bribe both Khalilur Rahman and the appellant "went aside" and held a conference and Khalilur Rahman then demanded Rs. 200. Rs. 80 was brought by the complainant and paid to the appellant at the instance of Khalilur Rahman for the purpose of counting and he in turn gave it to Khalilur Rahman who put it in his trouser's pocket. About this portion of the evidence the trial Court said "it may not be fully true" and the finding of the High Court was that the money remained with him and was not paid to Khalilur Rahman ; the question is whether in these circumstances the offence of abetment can be held to have been made out.

Under the Indian law for an offence of abetment it is not necessary that the offence should have been committed. A man may be guilty as an abettor whether the offence is committed or not. Section 165-A is as follows :

Section 165-A.—"Whoever abets any offence punishable under section 161 or section 165, whether or not that offence is committed in consequence of the abetment, shall be punished with imprisonment of either description for a term which may extend to three years or with fine or with both".

Therefore for a person to be guilty of abetment of an offence under sectiont 161, it is not necessary that the offence should have been committed. Abetment is defined in section 107 and a person abets the doing of a thing when (1) he instigates any person to do that thing or (2) engages with one or more other person or persons in any conspiracy for the doing of that thing, ...or (3) intentionally aids, by any act or illegal omission the doing of that thing. *Explanation* (2) to section 107 is as follows :

"Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commossion thereof, is said to aid the doing of that act."

It is not suggested that there was any instigation by the appellant for the commission of the offence. Further the circumstances proved against the appellant did not bring the case under the second part of section 107 because it is not alleged that there was any conspiracy and a charge of conspiracy must necessarily fail if the other alleged conspirator is acquitted : See *The King* v. *Plummer*[1], which has received the approval of this Court in *Topandas* v. *State of Bombay*[2]. In either of these cases it is immaterial whether the person instigated commits the offence or not or the persons conspiring together actually carry out the object of conspiracy.

There then remains the third part of section 107 that is abetment by aid. A person abets by aiding when by the commission of an act he intends to facilitate

1. L.R. (1902) 2 K.B. 339.
2. (1955) 2 S.C.R. 681: 1956 S.C.J. 86: (1956) 1 M.L.J. (S.C.) 60.

and does facilitate the commission thereof. By the acquittal of Khalilur Rahman the High Court must be deemed to have held that there was no offence under section 161. But it was contended on behalf of the respondent that the acquittal of Khalilur Rahman was wrong and this Court should hold that a wrong acquittal does not prevent the conviction of the appellant for the offence of abetment. Counsel for the respondent referred to *Dalip Singh* v. *State of Punjab*[1], where at page 156, Bose, J., said.:

" We have taken into consideration the fact that the High Court considers that the portion of Mst. Punnan's story regarding the lambardars has been falsely introduced by the police, also that both Courts have rejected the evidence about the dying declaration. Despite that, we agree with the learned Sessions Judge that Mst. Punnan and Mst. Charni are to be believed regarding the main facts and that they correctly named all seven accused as the assailants. On that findings the conviction under section 302 read with section 149 can be sustained. We accordingly uphold these convictions. The acquittals in the other three cases will of course stand but the mere fact that these persons have, in our opinion, been wrongly acquitted cannot affect the conviction in other cases."

In that case although the High Court had acquitted three accused persons of an offence under section 302 read with section 149, Indian Penal Code, yet as in the opinion of this Court the acquittal was wrong, section 149 was held applicable in the case of four others who had been convicted by the High Court of secion 302 read with section 149. The decision in that case must be circumscribed to the peculiar circumstances of that case. In the present case the person who demanded the illegal gratification for allowing the carts to proceed was Khalilur Rahman who had the authority to do or not to do a particular act and all that the appellant is alleged to have done was to receive the money at the instance of Khalilur Rahman for counting and then paid the money to him. It is not the prosecution case that the appellant abetted the offence by instigating Khalilur Rahman to demand the illegal gratification ; nor has the prosecution set up or proved a case of conspiracy between the appellant and Khalilur Rahman for the commission of an offence under section 161. On the finding of the Court the appellant received the money for and on behalf of Khalilur Rahman and the evidence of the complainant is that Khalilur Rahman had asked him to hand over the money to the appellant. If Khalilur Rahman is acquitted and therefore the offence under section 161 is held not to have been committed, then in this case no question of intentionally aiding by any act or omission the commission of the offence arises. It may be as counsel for the respondent contended that the acquittal of Khalilur Rahman is wrong and it appears and we say so with respect that the findings of the High Court are inconsistent but as the matter of Khalilur Rahman is not before us by way of appeal against acquittal we do not express any opinion on that question.

We are of the opinion that on the facts found and circumstances established in this case and as Khalilur Rahman has been acquitted the appellant's conviction cannot be upheld. We therefore allow this appeal and set aside the order of conviction. The bail bonds shall also stand discharged.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, S. J. IMAM AND J. L. KAPUR, JJ.

S. M. Jakati and another .. *Appellants**

v.

S. M. Borkar and others .. *Respondents.*

Hindu Law—Joint family—Debts—Avyavaharika—Test—Liability of father for misfeasance as Managing Director of a Bank—If binding on sons—Suit for partition filed by son—Effect on liability and pending execution against father.

Bombay Land Revenue Code, section 155—" *Right, title and interest*"—*Meaning.*

Any debt for a cause repugnant to good morals will be *avyavaharika*. The Managing Director of a Bank who should have been more vigilant in investing the monies of the Bank, is ordered to make

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1. (1953) S.C.J. 532 : 1954 S.C.R. 145.

* C.A. No. 233 of 1954. 24th September, 1958.

a contribution in the liquidation on the ground of his misfeasance (gross negligence in the discharge of his duties) cannot be said to have incurred the liability for a cause "repugnant to good morals". The debt was not *avyavaharika* and is therefore binding on the sons of the debtor (a Hindu father).

The liability of the sons to discharge the debts of the father which are not tainted with immorality or illegality is based on the pious obligation of the sons which continues to exist in the lifetime and after the death of the father and which does not come to an end as a result of partition of the joint family property. All that results from partition is that the right of the father to make alienation comes to an end.

Where the rignt, title and interest of a judgment-debtor are put up for sale, as to what passes to the auction-purchaser is a question of fact in each case dependant upon what was the estate put up for sale, what the Court intended to sell and what the purchaser intended to buy and did buy and what he paid for.

The words "right, title and interest" occurring in section 155 of the Bombay Land Revenue Code have the same connotation as they had in the corresponding words used in the Code of Civil Procedure existing at the time the Bombay Land Revenue Code was enacted.

In execution proceedings it is not necessary to implead the sons or to bring another suit if severance of status takes place pending the execution proceedings because the pious duty of the sons continues and consequently there is merely a difference in the mode of enjoyment of the property.

The liability of a father, who is a managing director and who draws a salary or remuneration, incurred as a result of negligence in the discharge of his duties, is not an *avyavaharika* debt as it cannot be termed as "repugnant to good morals."

Appeal from the Judgment and Decree, dated the 22nd August, 1950, of the Bombay High Court in Appeal No. 80 of 1946 from Original Decree, arising out of the Judgment and Decree, dated the 19th October, 1945, of the Court of Civil Judge, Senior Division, Dharwar, in Special Suit No. 64 of 1943.

A. V. Viswanatha Sastri, Senior Advocate (*M. S. K. Sastri*, Advocate, with him), for Appellant.

A. S. R. Chari, Senior Advocate, (*Bawa Shivcharan Singh* and *Govindsaran Singh*, Advocates, with him) for Respondents Nos. 2 to 4.

The Judgment of the Court was delivered by

Kapur, J. (*Sinha, J.*, agreeing)—This is an appeal against the judgment and decree of the High Court of Bombay varying the decree of the trial Court decreeing the plaintiff's suit for possession by partition of joint family property.

The facts of the case lie in a narrow compass. M. B. Jakati, defendant No. 1, was the Managing Director of Dharwar Urban Co-operative Bank, Limited, which went into liquidation, and in that capacity he was receiving a yearly remuneration of Rs. 1,000. As a result of certain proceedings taken against defendant No. 1, M.B. Jakati, by the liquidator of the Bank, a payment order for Rs. 15,100 was made by the Deputy Registrar of Co-operative Societies on April 21, 1942. In execution of this payment order a bungalow belonging to M. B. Jakati, defendant No. 1, was attached by the Collector under the Bombay Land Revenue Code on July 27, 1942. Notice for sale was issued on November 24, 1942, and the proclamation on December 24, 1942. The sale was fixed for February 2, 1943. On January 16, 1943, M. B. Jakati, defendant No. 1, applied for postponing the sale which was rejected. The auction-sale was held on February 2, 1943, and was confirmed on June 23, 1943—the purchaser was S. N. Borkar, defendant No. 7, now respondent No. 1. On February 10, 1944, respondent No. 1, sold the property to defendants 8 to 10 who are respondents 2 to 4.

The following pedigree table will assist in understanding the case :

Madhavarao Balakrishan Jakati, Deft. 1 =Bhimabai, Deft. 2.

Krishnaji Plff. 1	Shriniwas Plff. 1 (*a*)	Shantibai, daughter Deft. No. 3	Indumati, daughter Deft. No. 4

On January 15, 1943, Krishnaji, a son of defendant No. 1, brought a suit for partition of the joint family property and possession of his separate share alleging *inter alia* that the purchase by respondent No. 1 of the bungalow was not binding on the joint family as " it was not liable to be sold for the illegal and immoral acts on the part of defendant No. 1 which were characterised as misfeasance"; that the auction-sale was under section 155 of the Bombay Land Revenue Code under which only " the right, title and interest of the defaulter " could be sold and therefore the right, title and interest of only the father, defendant No. 1 was sold and not that of the other members. The plaintiff claimed ¼ share of the property and also alleged that he was not on good terms with his father who had neglected his interest ; that he was staying with his mother's sister and was not being maintained by his father and mother. On January 12, 1944, appellant No. 1 filed his written statement supporting the claim for partition and claiming his own share. He supported the claim of the then plaintiff that the sale in favour or respondent No. 1 was not binding on the joint family. Defendant No. 2, now appellant No. 2, the mother, also supported the plaintiff's claim and on the death of Krishnaji, she claimed his ¼ share as his heir. After the death of the original plaintiff Krishnaji, Shriniwas, appellant No. 1, was substituted as plaintiff on June 28, 1944.

The suit was mainly contested by respondents 1 to 4. Respondent No. 1 pleaded that plaintiff's suit for partition was collusive having been brought at the instance of the defendant No. 1, M. B. Jakati, and it was not *bona fide* ; that defendant No. 1 was made liable at the instance of the liquidator of the Dharwar Urban Co-operative Bank, Ltd., for misfeasance because he acted negligently in the discharge of his duties as managing director of the Bank ; that the debt was binding on the family as defendant No. 1, M.B. Jakati, had been receiving a yearly remuneration from the Bank and the properties were sold in payment of a debt binding on the family and therefore the sale in execution of the payment order could not be challenged as the sons were under a pious obligation under the Hindu Law to discharge the debts of their father ; that the sale could only be challenged on proof of the debt of defendant No 1 being for an "immoral or illegal" purpose. These pleadings gave rise to several issues.

The learned Civil Judge held that the suit was collusive ; that the liability which defendant No. 1 incurred was *avyavaharika* and was therefore not binding on the sons and thus appellant No. 1 would have ⅓ share in the joint family property, defendant No. 1, ⅓ and appellant No. 2 also ⅓. He therefore declared the shares as above in the whole of the joint family property including the bungalow which is the only property in which the respondents are interested and which is in dispute in this appeal.

On appeal the High Court held that the debt was not *avyavaharika* as there was no evidence to support the finding of the trial Court, the order of the Deputy Registrar being in the nature of a judgment to which neither the sons nor the auction-purchasers were parties and therefore it was not " evidence of anything except the historical fact that it was delivered". In regard to the question as to what interest passed to the auction-purchaser on a sale under section 155 of the Bombay Land Revenue Code, it held that the whole estate including the share of the sons was sold in execution of the payment order and therefore *qua* that property the sons had no interest left. The High Court varied the decree to this extent and the plaintiffs have come up in appeal to this Court by certificate of the High Court of Bombay.

The case of the appellants is (1) that the debt was *avyavaharika* and therefore in an auction sale the interest of the sons and other members of the joint family did not pass to the auction-purchaser ; (2) that even if the debt was not *avyavaharika* the institution of the suit for partition operated as severance of status between the members of the family and therefore the father's power of disposition over the son's share had come to an end and consequently in the auction sale the share of the sons did not pass to the auction-purchase ; and (3) that what could legally be sold under section 155 of the Bombay Land Revenue Code was the right, title and interest of

the defaulter, *i.e.*, of the father alone which could not include the share of the other members of the joint family.

The first question for decision is whether the debt of the father was *avyavaharika*. This term has been variously translated as being that which is not lawful or what is not just or what is not admissible under the law or under normal conditions. Colebrooke translated it as " a debt for a cause repugnant to good morals ". There is another track of decision which has translated it as meaning " a debt which is not supported as valid by legal arguments ". The Judicial Committee of the Privy Council in *Hem Raj* v. *Khem Chand*[1], held that the translation of the term as given by Colebrooke makes the nearest approach to the true conception of the term used in the *Smrithis* texts and may well be taken to represent its correct meaning and that it did not admit of a more precise definition.

In *Toshanpal Singh* v. *District Judge of Agra*[2], the Judicial Committee held that drawings of monies for unauthorised purposes, which amounted to criminal breach of trust under section 405 of the Indian Penal Code, were not binding on the sons, but a civil debt arising on account of the receipt of monies by the father which were not accounted for could not be termed *avyavaharika*.

In the case now before us the appellants have attempted to prove that the debt fell within the term *avyavaharika* by relying upon the payment order and the findings given by the Deputy Registrar in the payment order where the liability was *inter alia* based on a breach of trust. Any opinion given in the order of the Deputy Registrar as to the nature of the liability of defendant No. 1, M. B. Jakati, cannot be used as evidence in the present case to determine whether the debt was *avyavaharika* or otherwise. The order is not admissible to prove the truth of the facts therein stated and except that it may be relevant to prove the existence of the judgment itself, it will not be admissible in evidence. Section 43 of the Evidence Act, the principle of which is, that judgments excepting those upon questions of public and general interests, judgment *in rem* or when necessary to prove the existence of a judgment, order or decree, which may be a fact in issue are irrelevant. It was then submitted that the pleadings of respondent No. 1 himself show that the debt was of an immoral or illegal nature. In his written statement, respondent No. 1 had pleaded that the liquidator of the Bank had charged defendant No. 1 with misfeasance because he was grossly negligent in the discharge of his duty and responsibility as managing director and that after a thorough enquiry the Deputy Registrar held misfeasance proved and ordered a contribution of Rs. 15,100 by him. As we have said above the translation given by Colebrooke of the term *avyavaharika* is the nearest approach to its true concept, *i.e.*, "any debt for a cause repugnant to good morals." The managing director of a Bank of the position of defendant No. 1 who should have been more vigilant in investing the monies of the Bank cannot be said to have incurred the liability for a cause " repugnant to good morals ". We are unable to subscribe to the proposition that in the modern age with its complex institutions of Banks and Joint Stock Companies governed by many technicalities and complex system of laws the liability such as arisen in the present case could be called *avyavaharika*. The debt was therefore binding on the sons.

The effect of severance of status brought about by the filing of the suit on January 25, 1943, has been made the basis of the argument that only the share of the father could be seized in execution of the payment order made against him. This would necessitate an examination into the rights and liabilities of Hindu sons in a *Mitakshara* coparcenary family where the father is the *karta*. In Hindu Law there are two mutually destructive principles, one the principle of independent coparcenary rights in the sons which is an incident of birth, giving to the sons vested right in the coparcenary property, and the other the pious duty of the sons to discharge their father's debts not tainted with immorality or illegality, which lays open the whole estate to be seized for the payment of such debts. According

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1. (1943) 2 M.L.J. 397 : L.R. (1943) 70 I.A. 171, 176.

2. (1934) 68 M.L.J. 1 : L.R. 61 I.A. 350.

to the Hindu law-givers this pious duty to pay off the ancestors' debts and to relieve him of the death torments consequent on non-payment was irrespective of their inheriting any property, but the Courts rejected this liability arising irrespective of inheriting any property and gave to this religious duty a legal character. *Masit Ullah* v. *Damodar Prasad*[1]. For the payment of his debts it is open to the father to alienate the whole coparcenary estate including the share of the sons and it is equally open to his creditors to proceed against it; but this is subject to the sons having a right to challenge the alienation or protest against a creditor proceeding against their shares on proof of illegal or immoral purpose of the debt. These propositions are well-settled and are not within the realm of controversy. (*Panna Lal* v. *Mst. Naraini*[2], *Girdharee Lal* v. *Kantoo Lal* and *Mudhan Thakoor* v. *Kantoo Lal*[3], *Suraj Bansi Koer* v. *Sheo Prasad Singh*[4], *Brij Narain* v. *Mangala Prasad*[5]. In the last mentioned case the Privy Council said :—

"Nothing clearer could be said than what was said by Lord Hobhouse delivering the judgment of the Board in *Nanomi Babusin* v. *Modun Mohun*[6], already quoted ; destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for sometime established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditor's remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate, their Lordships think that there is no conflict of authority".

There is no discrepancy of judicial opinion as to the pious duty of Hindu sons. In *Panna Lal* v. *Mst. Naraini*[2], this Court approved the following dictum of Suleman, A.C.J., in *Bankeylal* v. *Durga Prasad*[7] :

"The Hindu Law texts based the liability on the pious obligation itself and not in the father's power to sell the sons' share".

So great was the importance attached to the payment of debts that Hindu law-givers gave the non-payment of a debt the status of sinfulness and such non-payment was wholly repugnant to Hindu concept of son's rights and liabilities. In *Bankeylal* v. *Durga Prasad*[7], Lal Gopal Mukherji, J., said at page 896 :—

"A perusal of text books of Smriti dealing with debts will show that under the Hindu Law the non-payment of a just debt was regarded as a very heinous sin."

The liability of the Hindu son based on his pious obligation again received the approval of this Court in *Sidheshwar Mukherji* v. *Bhubneshwar Prasad Narain Singh*[8] where the following observation made in *Panna Lal's case*[2],

"The father's power of alienating the family property for payment of his just debts may be one of the consequences of the pious obligation which the Hindu Law imposed upon the sons ; or it may be one of the means of enforcing it, but it is certainly not the measure of the entire obligation"

was reiterated. And again at page 183, Mukherjea, J., (as he then was) said:—

"It is a special liability created on purely religious grounds and can be enforced only against the sons of the father and no other coparcener. The liability, therefore, has its basis entirely on the relationship between the father and the son".

Therefore unless the son succeeds in proving that the decree was based on a debt which was for an immoral or illegal purpose the creditor's right of seizing in execution of his decree the whole coparcenary property including the son's share remains unaffected because except where the debt is for an illegal or immoral purpose it is open to the execution creditor to sell the whole estate in satisfaction of the judgment obtained against the father alone ; *Sripat Singh* v. *Tagore*[9]. The necessary corollary which flows from the pious obligation imposed on Hindu sons is that it is not ended by the partition of the family estate unless a provision has been made

1. (1926) 57 M.L.J. 792 : L.R. 53 I.A. 204.
2. (1952) 2 M.L.J. 83 : (1952) S.C.J. 211 : (1952) S.C.R. 544, 552, 553, 556, 559.
3. L.R. (1874) 1 I.A. 321, 333.
4. L.R. (1878) 6 I.A. 88, 101.
5. (1923) 46 M.L.J. 23 : L.R. 51 I.A. 129, 136.
6. L.R. 13 I.A. 1, 17, 18 (P.C.).
7. (1931) I.L.R. 53 All. 868, 896.
8. (1953) S.C.J. 700 : (1953) 2 M.L.J. 789 : (1954) S.C.R. 177, 183, 184.
9. L.R. (1916) 44 I.A. 1 : 32 M.L.J. 133,

for the payment of the just debts of the father. This again is supported by the authority of this Court in *Pannalal's case*[1], where Mukherjea, J., said at page 559 :—

"Thus, in our opinion, a son is liable, even after partition for the pre-partition debts of his father which are not immoral or illegal and for the payment of which no arrangement was made at the date of the partition".

The liability of the sons is thus unaffected by partition because the pious duty of the sons to pay the debt of the father, unless it is for an immoral or illegal purpose, continues till the debt is paid off and the pious obligation incumbent on the sons to see that their father's debts are paid, prevents the sons from asserting that the family estate so far as their interest is concerned is not liable to purge that debt. Therefore even though the father's power to discharge his debt by selling the share of his sons in the property may no longer exists as a result of partition the right of the judgment creditor to seize the erstwhile coparcenary property remains unaffected and undiminished because of the pious obligation of the sons. There does not seem to be any divergence of judicial opinion in regard to the Hindu son's liability to pay the debts of his father after partition and by the mere device of entering into partition with their father, the sons cannot get rid of this pious obligation. It has received the approval of this Court in *Panna Lal* v. *Mst. Naraini*[1] and *Sidheshwar Mukherji* v. *Bhubneshwar Prasad Narain Singh*[2] where Mukherjee, J., observed in the later case, at page 184.

" It is settled law that even after partition the sons could be made liable for the pre-partition debts of the father if there was no proper arrangement for the payment of such debts at the time when the partition was affected, although the father could have no longer any right of alienation in regard to the separated share of the sons ".

The question then arises how the liability of the sons is to be enforced. Another principle of Hindu Law is that in a coparcenary family the decree obtained against the father is binding on the sons as they would be deemed to have been represented by the father in the suit ; *Kishan Sarup* v. *Brijraj Singh*[3]. As was pointed out in *Sidheshwar Mukherji's case*[2], the sons are not necessary parties to a money suit against the father who is the *karta*, but they may be joined as defendants. The result of the partition in a joint family is nothing more than a change in the mode of enjoyment and what was held jointly is by the partition held in severalty and therefore attachment of the whole coparcenary estate would not be affected by the change in the mode of enjoyment, because the liability of the share which the sons got on partition remains unaffected as also the attachment itself which is not ended by partition. (Section 64, Civil Procedure Code, is a useful guide in such circumstances).

Dealing with the question as to how the interest of the sons in joint family property can be attached and sold, Mukherjea, J., (as he then was) observed at page 185 in *Sidheshwar Mukherji's case*[2] :—

" Be that as it may, the money decree passed against the father certainly created a debt payable by him. If the debt was not tainted with immorality, it was open to the creditor to realise the dues by attachment and sale of the sons' coparcenary interest in the joint property on the principles discussed above. As has been laid down by the Judicial Committee in a series of cases, of which the case of *Nanomi Babuasin* v. *Modun Mohun*[3], may be taken as a type, the creditor has an option in such cases. He can, if he likes, proceed against the father's interest alone but he can, if he so chooses, put up to sale the son's interest also and it is a question of fact to be determined with reference to the circumstances of each individual case whether the smaller or the larger interest was actually sold in execution ".

But it was contended that a partition after the decree but before the auction-sale limited the efficacy of the sale to the share of the father even though the sale in fact was of the whole estate, including the interest of the sons, because after the partition the father no longer possessed the right of alienation of the whole coparcenary estate to discharge his debts. But this contention ignores the doctrine of pious obligation of the sons. The right of the pre-partition creditor to seize the

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1. (1929) I.L.R. 51 All. 932. (1954) S.C.R. 177, 183, 184.
2. (1953) 2 M.L.J. 789 : (1953) S.C.J. 700: 3. L.R. 13 I.A. 1.

property of the erstwhile joint family in execution of his decree is not dependent upon the father's power to alienate the share of his sons but on the principle of pious obligation on the part of the sons to discharge the debt of the father. The pious obligation continues to exist even though the power of the father to alienate may come to an end as a result of partition. The consequence is that as between the sons' right to take a vested interest jointly with their father in their ancestral estate and the remedy of the father's creditor to seize the whole of the estate for payment of his debt not contracted for immoral or illegal purpose, the latter will prevail and the sons are precluded from setting up their right and this will apply even to the divided property which, under the doctrine of pious obligations continue, to be liable for the debts of the father. Therefore where the joint ancestral property including the share of the sons has passed out of the family in execution of the decree on the father's debt the remedy of the sons would be to prove in appropriate proceedings taken by them the illegal or immoral purpose of the debt and in the absence of any such proof the sale will be screened from the sons' attack because even after the partition their share remains liable. *Girdhareelal* v. *Kantoolal*[1], *Suraj Bansi Koer* v. *Sheo Prasad Narain Singh*[2], *Mussamat Nanomi Babuasin* v. *Modhun Mohun*[3], *Chandra Deo Singh* v. *Mata Prasad*[4], which was approved by the Privy Council in *Sahu Ram Chander* v. *Bhup Singh*[5], *Pannalal* v. *Naraini*[6], and *Sidheshwar Mukherji's case*[7].

Our attention was drawn to two decisions, one by the High Court of Bombay, in *Ganpatrao* v. *Bhimrao*[8], that in order to make the share of the sons liable after partition they should be brought on the record and the other of the Madras High Court in *Kameshwaramma* v. *Venkatasubba Row*[9], that the creditor has to bring another suit against the sons, obtain a decree against them limited to the shares allotted to them on partition and then attach and sell their share unless the partition was not *bona fide* in which case the decree could be executed against the joint family property. But the decision in these cases must be confined to their own facts. It is true that the right of the father to alienate for payment of personal debt is ended by the partition, but as we have said above, it does not affect the pious duty of the sons to discharge the debt of their father. Therefore where after attachment and a proper notice of sale the whole estate including the son's share, which was attached is sold and the purchaser buys it intending it to be the whole coparcenary estate, the presence of the sons *eo nomine* is not necessary because they still have the right to challenge the sale on showing the immoral or illegal purpose of the debt. In our opinion where the pious obligation exists and partition takes place after the decree and pending execution proceedings as in the present case, the sale of the whole estate in execution of the decree cannot be challenged except on proof by the sons of the immoral or illegal purpose of the debt and partition cannot relieve the sons of their pious obligation or their shares of their liability to be sold or be a means of reducing the efficacy of the attachment or impair the rights of the creditor, Reliance is placed on the Judgment in *Khiarujmal* v. *Daim*[10] where the Privy Council held that the sale cannot be treated as void on the ground of mere irregularity but the Court has no jurisdiction to sell the property of persons " not parties to the proceedings or properly represented on the record ". There two such persons were Alibux and Naurez. As against Alibux there was no decree. He was not a party to the suit and it was held by the Privy Council that his interest in the property " seems to have been ignored altogether ". He was not even mentioned as a debtor in the award on the basis of which the decree, which was executed was made. Similarly Naurez was not represented in either of the suits and therefore there was no decree against him and the sale of his property

1. L.R. (1874) 1 I.A. 321, 333.
2. L.R. (1878) 6 I.A. 88, 101.
3. L.R. (1885) 13 I.A. 1.
4. (1909) I.L.R. 31 All. 176, 196.
5. L.R. 44 I.A. 126 : 33 M.L.J. 14 (P.C.).
6. 1952 S.C.R. 544, 552, 553, 556, 556, 559: 1952 S.C.J. 211 : (1952) 2 M.L.J. 83.
7. (1953) S.C.J. 700 : (1953) 2 M.L.J. 789: (1954) S.C.R. 177, 183, 184.
8. I.L.R. (1950) Bom. 114.
9. (1914) 27 M.L.J. 112 : I.L.R. 38 Mad. 1120.
10. L.R. (1904) 32 I.A. 23.

also was therefore without jurisdiction and null and void. This case cannot apply to sons in a joint Hindu family where a father represents the family and the decree is executable against the shares of the sons while the coparcenary continues and the liability of their shares continues after partition. *Sat Narain* v. *Das*[1], is equally inapplicable to the present case. There the Privy Council was dealing with the father's power of disposal of property before and after partition which power vests in the Official Assignee on his bankruptcy, the question of the right of the judgment-creditor to proceed in execution against the divided shares of sons which had been attached before partition was not a point in controversy. There was no decision on the powers of an executing Court to proceed against the shares of the sons but the question related to voluntary alienations by a father for payment of his debts not incurred for an immoral or illegal purpose.

In cases where the sons do not challenge the liability of their interest in the execution of the decree against the father and the Court after attachment and proper notice of sale sells the whole estate and the auction-purchaser purchases and pays for the whole estate, the mere fact that the sons were *eo nomine* not brought on the record would not be sufficient to defeat the rights of the auction-purchaser or put an end to the pious obligation of the sons. As was pointed out by Lord Hobhouse in *Malkarjun Bin Shidramappa Pasare* v. *Narhari Bin Shivappa*[2].

> "Their Lordships agree with the view of the learned Chief Justice that a purchaser cannot possibly judge of such matters, even if he knows the facts ; and that if he is to be held bound to enquire into the accuracy of the Court's conduct of its own business, no purchaser at a Court sale would be safe. Strangers to a suit are justified in believing that the Court has done that which by the directions of the Court it ought to do ".

In *Mussamat Nanomi Babuasin* v. *Modun Mohan*[3], Lord Hobhouse said at p. 18 :

> "But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings."

The question which assumes importance in an auction sale of this kind, therefore, is what did the Court intend to sell and did sell and what did the auction-purchaser purport to buy and did buy and what did he pay for. One track of decision of which *Shambu Nath Pandey* v. *Golab Singh*[4], is an instance, shows when the father's share alone passes. In that case the father alone was made a party to the proceedings. The mortgage, the suit of the creditor and the decree and the sale-certificate all purported to affect the rights of the father and his interest alone. It was therefore held that whatever the nature of the debt, only the father's right and interest was intended to pass to the auction-purchaser. In *Meenakshi Naidu* v. *Immudi Kanaka Rammaya Kounden*[5], which represents the other track of decision the Privy Council held that upon the documents the Court intended to sell and did sell the whole of the coparcenary interest and not any partial interest. The query in decided cases has been as to what was put up for sale and was sold and what the purchaser had reason to think he was buying in execution of the decree. *Mussamat Nanomi Babuasin* v. *Modun Mohun*[3], *Bhagbut Persad* v. *Mussamat Girja Koer*[6], *Meenakshi Naidu* v. *Immudi Rammaya Koundan*[5] and *Rai Babu Mahabir Parsad* v. *Rai Markunda Nath Sahai*[7], and *Daulat Ram* v. *Mehr Chand*[8].

In the present case the payment order was made by the Deputy Registrar on April 21, 1942 and after the order had been sent to the Collector for recovery, the property was attached on April 24, 1942, and notice of sale was issued on November 24, 1942 and was published under sections 165 and 166 of the Bombay Land Revenue Code. The proclamation of sale was dated December 12, 1942.

The property put up for sale was plot No. 36-D measuring 6 acres and one guntha and its value was specified as 13,000 rupees. There was a note added :—

1. (1936) 71 M.L.J. 812 : L.R. 63 I.A. 384.
2. (1900) 10 M.L.J. 368 : L.R. 27 I.A. 216, 225.
3. L.R. (1885) 13 I.A. 1.
4. L.R. (1887) 14 I.A. 77.
5. (1888) 12 Mad. 142 : L.R. 16 I.A. 1.
6. L.R. (1888) 15 I.A. 99.
7. L.R. (1889) 17 I.A. 11, 16.
8. L.R. (1889) 14 I.A. 187.

"No gurantee is given of the title of the said defendant or of the validity of any of the rights, charges or interests claimed by third parties".

The order confirming the sale also shows that the whole bungalow was sold. It was valued at Rs. 16,000 and there was a mortgage of Rs. 2,000 against it and what was sold and confirmed by this order was the whole bungalow. The sale certificate was in regard to the whole bungalow, *i.e.*, City Survey No. 67-D measuring 6 acres and one guntha the sale price being Rs. 13,025. There is little doubt, therefore that what was put up for auction sale was the whole bungalow and what the auction-purchaser purported to buy and paid for was also the whole bungalow and not any fractional share in it. It is a case where not only was the payment order passed before the partition but the attachment was made and the sale proclamation was issued before the suit for partition was filed and the sale took place of the whole property without any protest or challenge by the sons and without any notice to the Collector or the judgment-creditor of the filing of the suit for partition. In such a case respondent No. 1 is entitled to defend his title upon the grounds which would have justified the sale had the appellants been brought on record in execution proceedings. The binding nature of the decree passed on the father's debts not tainted with immorality or illegality and the pious obligation imposed on the sons under the Mitakshara law would be sufficient to sustain the sale and defeat the sons' suit in the same way and on the same grounds as in the case of execution proceedings. *Nanomi Babuasin* v. *Modun Mohun*[1]. Consequently whether the sons were made parties to the execution proceedings or brought a suit challenging the sale of their shares the points for decision are the same—the nature of the debts and liability of the sons under Hindu law and these are the determining factors in both the cases, *i.e.*, the sons being parties to the execution proceedings or their suit challenging the sale of their shares.

The effect of attachment on the severance of status by the filing of a suit by one of the members of the coparcenary whose share was liable in execution of the decree has not been debated at the Bar and how exactly it would affect the rights of the parties need not therefore be decided in this case. As a consequence it would not be necessary to discuss the pronouncements of the Privy Council in *Suraj Bansi Koer* v. *Sheo Prasad Singh*[2], *Moti Lal* v. *Karrabuldin*[3], *Ragunath Das* v. *Sundar Das Khetri*[4], *Ananta Padmanabha Swami* v. *Official Receiver, Secunderabad*[5].

The argument based on the interpretation of the words 'right, title and interest of the defaulter' in section 155 of the Bombay Land Revenue Code was that it was only the share of the defaulter himself which was and could be put up for auction sale. That the whole of the property was put up for sale, was sold and was purchased as such is shown by the documents to which reference has already been made, *viz.*, the notice of November 24, 1942, proclamation of sale of December 24, 1942, the order of confirmation of sale, dated June 28, 1943, and the sale certificate issued by the Collector.

The Civil Procedure Code at the time of the enactment of the Bombay Land Revenue Code required that the property sold in execution should be described as "right, title and interest of the judgment-debtor" and the same words have been used in section 155 of the Bombay Land Revenue Code. It is a question of fact in each case as to what was sold in execution of the decree. In *Rai Babu Mahabir Persad* v. *Markunda Nath Sahai*[6], Lord Hobhouse observed as follows at page 16 :—

"It is a question of fact in each case, and in this case their Lordships think that the transactions of the 4th and 5th of January, 1875, and the description of the property in the sale certificate, are conclusive to shew that the entire corpus of the estate was sold".

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1. L.R. (1885) 13 I.A. 1.
2. L.R. (1878) 6 I.A. 88, 101.
3. L.R. (1897) 24 I.A. 170.
4. (1914) 27 M.L.J. 150 : L.R. 41 I.A. 251.
5. (1933) 64 M.L.J. 562 : I.L.R. 56 M. 405 : L.R. 60 I.A. 167, 174-5.
6. L.R. (1889) 17 I.A. 11, 16.

Similarly in *Meenakshi Naidu* v. *Immudi Kanaka Rammaya Kounden*[1], the whole interest of the coparcenary was held to be sold taking into consideration the evidence which had been placed on the record. Lord Fitzgerald, at page 5, pointed out the difference where only the father's interest was intended to pass :—

" In Hurdey Narain's case (*Hurdey Narain* v. *Rooder Perkash*[2], all the documents shewed that the Court intended to sell, and that it did sell nothing but the father's share—the share and interest that he would take on partition, and nothing beyond it—and this tribunal in that case puts it entirely upon the ground that everything shewed that the thing sold was 'whatever rights and interest the said judgment-debtor had in the property' and nothing else".

In *Sripat Singh* v. *Tagore*[3], the " right, title and interest of the judgment-debtor" were sold and there also it was held to convey the whole coparcenary estate and it was remarked that it was of the utmost importance that the substance and not merely the technicality of the transaction should be regarded. What is to be seen is what was put up for sale, what the Court intended to sell and what the purchaser was intending to buy and what he purported to buy.

Counsel for the appellants relied on *Shambu Nath Panday* v. *Golab Singh*[4], where it was held that right and interest of the father meant personal interest but in that case as we have pointed out, the documents produced all showed that the father's interest alone was intended to pass.

In *Mulgund Co-operative Credit Society* v. *Shidlingappa Ishwarappa*[5], it was held that the sale under Bombay Land Revenue Code has the same effect as the sale by the Civil Court. The language used in the Bombay Land Revenue Code and the then existing Civil Procedure Code is similar, *i.e.*, "the right, title and interest of the defaulter " in one case and " of the judgment-debtor " in the other. This is supported by the observation of the Privy Council in *Rai Babu Mahabir Persad* v. *Markunda Nath Sahai*[6], and as to what passed under the sale does not become any different merely because the sale is held under section 155 of the Bombay Land Revenue Code rather than the Code of Civil Procedure. The effect in both cases is the same.

We hold therefore (1) that the liability of the sons to discharge the debts of the father which are not tainted with immorality or illegality is based on the pious obligation of the sons which continues to exist in the lifetime and after the death of the father and which does not come to an end as a result of partition of the joint family property. All that results from partition is that the right of the father to make alienation comes to an end. (2) Where the right, title and interest of a judgment-debtor are set up for sale as to what passes to the auction-purchaser is a question of fact in each case dependent upon what was the estate put up for sale what the Court intended to sell and what the purchaser intended to buy and did buy and what he paid for. (3) The words " right, title and interest " occurring in section 155 of the Bombay Land Revenue Code have the same connotation as they had in the corresponding words used in the Code of Civil Procedure existing at the time the Bombay Land Revenue Code was enacted. (4) In execution proceedings it is not necessary to implead the sons or to bring another suit if severance of status takes place pending the execution proceedings because the pious duty of the sons continues and consequently there is merely a difference in the mode of enjoyment of the property. (5) The liability of a father, who is a managing director and who draws a salary or a remuneration, incurred as a result of negligence in the discharge of his duties is not an *avyavaharika* debt as it cannot be termed as "repugnant to good morals ".

In the result the appeal fails and is dismissed with costs.

Appeal dismissed.

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1. (1888) 12 Mad. 142 : L.R. 16 I.A. 1.
2. L.R. (1883) 11 I.A. 26, 29.
3. (1916) 32 M.L.J. 133 : L.R. 44 I.A. 1.
4. L.R. (1887) 14 I.A. 77.
5. A.I.R. 1941 Bom. 385.
6. L.R. (1889) 17 I.A. 11, 16.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—T. L. VENKATARAMA AIYAR, P. B. GAJENDRAGADKAR AND A. K. SARKAR, JJ.

G. Venkataswami Naidu & Co. .. *Appellant**

v.

The Commissioner of Income-tax .. *Respondent.*

Income-tax Act (XI of 1922), *section* 66 (1)—*Jurisdiction of High Court—Scope—Question whether solitary transaction was an adventure in the nature of trade—Nature of.*

If the point raised on reference relates to the construction of a document of title or to the interpretation of the relevant provisions of the statute, it is a pure question of law; and in dealing with it though the High Court may have due regard for the view taken by the Tribunal, its decision would not be fettered by the said view. It is free to adopt such construction of the document or the statute, as appears to it reasonable. In some cases, the point sought to be raised on reference may turn out to be a pure question of fact ; and if that be so, the finding of fact recorded by the Tribunal must be regarded as conclusive in proceedings under section 66 (1). If, however, such a finding of fact is based on an inference drawn from primary evidentiary facts proved in the case, its correctness or validity is open to challenge in reference proceedings within narrow limits. The assessee or revenue can contend that the inference has been drawn on considering inadmissible evidence or after excluding admissible and relevant evidence ; and, if the High Court is satisfied that the inference is the result of improper admission or exclusion of evidence, it would be justified in examining the correctness of the conclusion. It may also be open to the party to challenge a conclusion of fact drawn by a Tribunal on the ground that it is not supported by any legal evidence or that the impugned conclusion drawn from the relevant facts is not rationally possible; and if such a plea is established, the Court may consider whether the conclusion in question is not perverse and should not, therefore be set aside. It is within these narrow limits that the conclusions of fact recorded by the Tribunal can be challenged under section 66 (1). Such conclusions can never be challenged on the ground that they are based on misappreciation of evidence.

In dealing with findings on questions of mixed law and fact the High Court would no doubt have to accept the findings of the Tribunal on the primary question of fact ; but it is open to the High Court to examine whether the Tribunal had applied the relevant legal principles correctly or not and in that sense, the scope of the enquiry and the extent of the jurisdiction of the High Court in dealing with such points is the same as in dealing with pure points of law.

The decision about the character of a transaction in the context cannot be based solely on the application of any abstract rule, principle or test and must in every case depend upon all the relevant facts and circumstances.

[On the facts and circumstances it was held that the High Court was right in taking the view that the transaction in question (sale of sites to the company) was an adventure in the nature of trade.]

Appeal by Special leave from the Judgment and Order, dated the 18th April, 1955, of the Madras High Court in Case Referred No. 25 of 1952.

A. V. Viswanatha Sastri, Senior Advocate (*M. S. K. Sastri,* Advocate with him) for Appellant.

M. C. Setalvad, Attorney-General for India (*R. Ganapathy Iyer, R. H. Dhebar* and *D. Gupta,* Advocates with him), for Respondent.

The Judgment of the Court was delivered by

Gajendragadkar, J.—The appellant is a firm acting as managing agents of the Janardana Mills Ltd., Coimbatore. It purchased four contiguous plots of land admeasuring 5 acres 26 cents under four sale-deeds executed on October 25, 1941, November 15, 1941, June 29, 1942 and November 19, 1942, respectively for a total consideration of Rs.8,712-15-6. After about five years these properties were sold by the appellant in two lots to the Janardana Mills, Ltd. The first lot was sold on September 1, 1947, and the second on November 10, 1947, the total consideration for the two sales being Rs. 52,600. These two sales realised for the appellant a sum of Rs. 43,887-0-6 in excess of the purchase price.

The Income-tax Officer treated the said amount of Rs. 43,887 as the income of the appellant for the assessment year 1948-49, and assessed it to income-tax under the

* C.A. No. 709 of 1957. 24th November, 1958.

head "business". The officer held that there was no evidence to show that the appellant had purchased the said lands for agricultural purposes or that it had acquired them as an investment. He also found that, since the lands were adjacent to the Janardana Mills, the appellant must have purchased then solely with a view to sell them to the said mills with a profit. That is why, though the transaction was in the nature of a solitary transaction, it was held that it had all the elements of a business transaction and was thus an adventure in the nature of trade.

Against this order of assessment the appellant preferred an appeal to the Appellate Assistant Commissioner. The appellate authority upheld the appellant's contention that the amount in question was not assessable as it cannot be held to be income or profit resulting from a profit-making scheme, and set aside the order under appeal.

The respondent challenged the correctness of this order by taking an appeal against it to the Income-tax Appellate Tribunal. The tribunal agreed with the view taken by the Income-tax Officer and held that the amount in question was not a capital accretion but a gain made in an adventure in the nature of business in carrying out a scheme of profit-making. The tribunal rejected the explanations given by the appellant as to why it had purchased the properties and held that the purchase had been made by the appellant solely with a view to sell the said properties at profit to the Janardana Mills.

At the instance of the appellant the tribunal then referred to the High Court of Madras the question suggested by it in these words :

> "whether there was material for the assessment of the sum of Rs. 43,887 being the difference between the purchase and sale price of the four plots of land as income from an adventure in the nature of trade".

This reference was heard by Rajagopalan and Rajagopala Ayyangar, JJ., and the question referred has been answered against the appellant. The High Court has held that the transaction in question was an adventure in the nature of trade and so the respondent was justified in taxing the amount in question under the head "business" for the relevant year. The application for leave made by the appellant was rejected by the High Court. Thereupon the appellant applied for, and obtained, special leave to appeal to this Court. That is how the appeal has been admitted in this Court ; and the only question which it raises for our decision is whether the High Court was right in holding that the transaction in question was an adventure in the nature of trade.

We may at this stage briefly indicate the material facts and circumstances found by the tribunal and the inference drawn by it in regard to the character of the transaction in question. The appellant purchased the four plots under four different sale-deeds. The first purchase was for Rs. 521 and it covered a piece of land admeasuring 28 ¼ cents ; the second purchase related to 2 acres 79 ½ cents and the price paid was Rs. 1,250; while the third and the fourth purchases were for Rs. 1,942 and Rs. 5,000 and they covered 28 ¼ cents and 1 acre and 90 cents respectively. The property purchased under the first sale-deed was sold on November 10, 1947, for Rs. 2,825 whereas the three remaining properties were sold on September 1, 1947, for Rs. 49,775 the purchaser in both cases being the Janardana Mills, Ltd. The purchase of the first item of property by the appellant had been made in the name of Mr. V. G. Raja, assistant manager of the Janardhana Mills Ltd., who is the son-in-law of G. Venkataswami Naidu, one of the partners of the appellant firm. Naturally when this property was sold to the mills the document was executed by the ostensible owner V. G. Raja. It is not disputed that the purchase in the name of V. G. Raja was benami for the appellant. All the plots which were thus purchased by the appellant piecemeal are contiguous and they adjoin the mills. On the plot purchased on June 29, 1942, there stood a house of six rooms, which fetched an annual rent of about Rs. 100 ; and, after deduction of taxes, it left a net income of Rs. 80 per year to the appellant. The other plots are vacant sites and they brought no income to the appellant. During the time that the appellant was in possession of these plots it made no effort to put up,

any structures on them or to cultivate them; and so it was clear that the only object with which the appellant had purchased these plots was to sell them to the mills at a profit. It was, however, urged by the appellant that the properties had been bought as an investment. This plea was rejected by the tribunal. The tribunal likewise rejected the appellant's case that it had purchased the plots for building tenements for the labourers working in the Janardana Mills. Alternatively it was urged by the appellant that the Janardana Mills decided to purchase the plots because an award passed by an industrial tribunal in June, 1947, had recommended that the mills should provide tenements for its labourers. Thus the appellant's case was that it had not purchased the properties with a view to sell them to the mills and the mills in fact would not have purchased them but for the recommendation made by the award which made it necessary for the mills to purchase the adjoining plots for the purpose of building tenements for its employees. The tribunal was not impressed even by this plea ; and so it ultimately held that the plots had been purchased by the appellant wholly and solely with the idea of selling them at profit to the mills. The tribunal thought that since the appellant was the managing agent of the mills it was in a position to influence the decision of the mills to purchase the properties from it and that was the sole basis for its initial purchase of the plots. On these findings the tribunal reached the conclusion that the sum of Rs. 43,887 was not a capital accretion but was a gain made in the adventure in the nature of business in carrying out the scheme of profit-making. The appellant contends that, on the facts and circumstances found in the case, it is erroneous in law to hold that the transaction in question is an adventure in the nature of trade.

There is no doubt that the jurisdiction conferred on the High Court by section 66 (1) is limited to entertaining references involving questions of law. If the point raised on reference relates to the construction of a document of title or to the interpretation of the relevant provisions of the statute, it is a pure question of law ; and in dealing with it, though the High Court may have due regard for the view taken by the tribunal, its decision would not be fettered by the said view. It is free to adopt such construction of the document or the statute as appears to it reasonable. In some cases, the point sought to be raised on reference may turn out to be a pure question of fact ; and if that be so, the finding of fact recorded by the tribunal must be regarded as conclusive in proceedings under section 66 (1). If, however, such a finding of fact is based on an inference drawn from primary evidentiary facts proved in the case, its correctness or validity is open to challenge in reference proceedings within narrow limits. The assessee or the revenue can contend that the inference has been drawn on considering inadmissible evidence or after excluding admissible and relevant evidence ; and, if the High Court is satisfied that the inference is the result of improper admission or exclusion of evidence, it would be justified in examining the correctness of the conclusion. It may also be open to the party to challenge a conclusion of fact drawn by the tribunal on the ground that it is not supported by any legal evidence ; or that the impugned conclusion drawn from the relevant facts is not rationally possible ; and if such a plea is established, the Court may consider whether the conclusion in question is not perverse and should not, therefore, be set aside. It is within these narrow limits that the conclusions of fact recorded by the tribunal can be challenged under section 66 (1). Such conclusions can never be challenged on the ground that they are based on misappreciation of evidence. There is yet a third class of cases in which the assessee or the revenue may seek to challenge the correctness of the conclusion reached by the tribunal on the ground that it is a conclusion on a question of mixed law and facts. Such a conclusion is no doubt based upon the primary evidentiary facts, but its ultimate form is determined by the application of relevant legal principles. The need to apply the relevant legal principles tends to confer upon the final conclusion its character of a legal conclusion and that is why it is regarded as a conclusion on a question of mixed law and fact. In dealing with findings on questions of mixed law and fact the High Court would no doubt have to accept the findings of the tribunal on the primary questions of fact; but it is open to the High Court to examine whether the tribunal had applied the relevant legal principles correctly or not; and in that sense, the scope of enquiry and

the extent of the jurisdiction of the High Court in dealing with such points is the same as in dealing with pure points of law.

This question has been exhaustively considered by this Court in *Meenakshi Mills, Madurai* v. *Commissioner of Income-tax, Madras*[1]. In this case the appellate tribunal had come to the conclusion that certain sales entered in the books of the appellant company in the names of certain intermediaries, firms and companies, were fictitious and the profits ostensibly earned by them were in fact earned by the appellant which had itself sold the goods to the real purchasers and received the prices. On this finding the tribunal had ordered that the profits received from such sales should be added to the amount shown as profits in the appellant's books and should be taxed. The appellant applied for a reference to the tribunal under section 66 (1) and the High Court of Madras under section 66 (2), but his application was rejected. Then it came to this Court by special leave under Article 136 and it was urged on its behalf that the tribunal had erred in law in holding that the firms and companies described as the intermediaries were its benamidars and that its application for reference should have been allowed. This plea was rejected by this Court because it was held that the question of benami is purely a question of fact and not a mixed question of law and fact as it does not involve the application of any legal principles for its determination. In dealing with the argument urged by the appellant, this Court has fully considered the true legal position in regard to the limitation of the High Court's jurisdiction in entertaining references under section 66 (1) in the light of several judicial decisions bearing on the point. The ultimate decision of the Court on this part of the case was that

"on principles established by authorities only such questions as relate to one or the other of the following matters can be questions of law under section 66 (1) : (1) the construction of a statute or a document of title; (2) the legal effect of the facts found where the point for determination is a mixed question of law and fact; and (3) a finding of fact unsupported by evidence or unreasonable and perverse in nature".

Having regard to this legal position this Court held that the question of benami was a pure question of fact and it could not be agitated under section 66 (1).

The point about the scope and effect of the provisions of section 66 (1) has again been considered by this Court in *The Oriental Investment Co., Ltd.* v. *Commissioner of Income-tax, Bombay*[2]. This was a case on the other side of the line. It was held that whether the appellant's business amounted to dealing in shares and properties or to investment is a mixed question of law and fact and that the legal effect of the facts found by the tribunal as a result of which the appellant could be treated as a dealer or investor is a question of law. As a result of this conclusion the appeal preferred by the appellant was allowed, the order passed by the High Court refusing the appellant's request for reference was set aside and the case was remitted to it for directing the tribunal to state a case on the two questions mentioned in the judgment. These two decisions bring out clearly the distinction between findings of fact and findings of mixed questions of law and fact.

What then is the nature of the question raised before us in the present appeal? The tribunal and the High Court have found that the transaction in question is an adventure in the nature of trade; and it is the correctness of this view that is challenged in the present appeal. The expression "adventure in the nature of trade" is used by the Act in section 2, sub-section (4) which defines business as including any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture. Under section 10, tax shall be payable by an assessee under the head profits and gains of business, profession or vocation in respect of the profit or gains of any business, profession or vocation carried on by him. Thus the appellant would be liable to pay the tax on the relevant amount if it is held that the transaction which brought him this amount was business within the meaning of sec-

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1. (1957) 1 An.W.R. (S.C.) 1 : (1957) 1 M.L.J. (S.C.) 1 : (1957) S.C.J. 1 : 1956 S.C.R. 691.

2. (1958) 1 M.L.J. (S.C.) 18: (1958) 1 An. W.R. (S.C.) 18 : (1958) S.C.J. 37 : 1958 S.C.R. 49.

tion 2, sub-section (4) and it can be said to be business of the appellant if it is held that it is an adventure in the nature of trade. In other words, in reaching the conclusion that the transaction is an adventure in the nature of trade, the tribunal has to find primary evidentiary facts and then apply the legal principles involved in the expression "adventure in the nature of trade" used by section 2, sub-section (4). It is patent that the clause "in the nature of trade" postulates the existence of certain elements in the adventure which in law would invest it with the character of a trade or business ; and that would make the question and its decision one of mixed law and fact. This view has been incidentally expressed by this Court in the case of *Meenakshi Mills, Madurai*[1], in repelling the appellant's argument based on the decision of the House of Lords in *Edwards* v. *Bairstow*[2]. For the respondent, the learned Attorney-General has, however, relied on the fact that the relevant observations in the case of *Meenakshi Mills, Madurai*[1] are *obiter* and he has invited our attention to the decision in the case of *Edwards*[2], in support of his contention that the judgment of the House of Lords would show tht the question about the character of the transaction was ultimately treated as a question of fact. Before we refer to the said decision it may be relevant to observe that there are two ways in which the question may be approached. Even if the conclusion of the tribunal about the character of the transaction is treated as a conclusion on a question of fact, it cannot be ignored that, in arriving at its final conclusion on facts proved, the tribunal has undoubtedly to address itself to the legal requirements associated with the concept of trade or business. Wihout taking into account such relevant legal principles it would not be possible to decide whether the transaction in question is or is not in the nature of trade. If that be so, the final conclusion of the tribunal can be challenged on the ground that the relevant legal principles have been misapplied by the tribunal in reaching its decision on the point ; and such a challenge would be open under section 66 (1) because it is a challenge on a ground of law. The same result is achieved from another point of view and that is to treat the final conclusion as one on a mixed question of law and fact. On this view the conclusion is not treated as one on a pure question of fact, and its validity is allowed to be impeached on the ground that it has been based on a misapplication of the true legal principles. It would thus be seen that whether we call the conclusion in question as one of fact or as one on a question of mixed law and fact, the application of legal principles which is an essential part in the process of reaching the said conclusion is undoubtedly a matter of law and if there has been an error in the application of the said principles it can be challenged as an error of law. The difference then is merely one of form and not substance ; and on the whole it is more convenient to describe the question involved as a mixed question of law and fact. That is the view expressed by this Court in the case of *Meenakshi Mills, Madurai*[1] ; and, in our opinion, it avoids any confusion of thought and simplifies the position by treating such questions as analogous to those falling under the category of questions of law.

Let us then consider whether the decision of the House of Lords in the case of *Edwards*[2] is inconsistent with this view. In this case the respondents, who were respectively a director of a leather manufacturing company and an employee of a spinning firm purchased a complete cotton spinning plant in 1946 with the object of selling it as quickly as possible at a profit. They hoped to sell the plant in one lot, but ultimately had to dispose of it in five separate lots over the period from November, 1946 to February, 1948. Assessments to income-tax in respect of profits arising from this transaction were made under Case I of Schedule D for the years 1946-47 and 1947-48. On the matter being taken before the Chancery Division, it was held in accordance with the earlier decisions of the Court of Appeal in *Cooper* v. *Stubbs*[3], and *Leeming* v. *Jones*[4], that the finding of the General Commissioners was a finding of fact which could not be challenged in appeal. The attention of the Court was drawn to the different view expressed in a Scottish case, *Commissioners of Inland Revenue* v. *Fraser*[5],

1. (1957) 1 M.L.J. (S.C.) 1 : (1957) S.C.J. 1 : (1957) 1 An.W.R. (S.C.) 1 : (1956) S.C.R. 691.
2. (1955) 28 I.T.R. 579 : 36 T.C. 207.
3. (1925) 10 T.C. 29.
4. (1930) 15 T.C. 333.
5. (1942) 24 T.C. 498.

where the Court of Session had held that it was at liberty to treat the matter as a mixed question of fact and law, and in fact it had overruled the finding of the General Commissioners in that behalf. "It does not seen to me", observed Upjohn, J.,

"that in this Court I am at liberty to follow the practice of the Scottish Court, attractive though it would be to do so, if the matter was *res integra*".

However, since apparently the finding of the General Commissioners did not appear to the Court to be satisfactory, the matter was remitted to them with an intimation that they should consider the question whether the transaction, being an isolated transaction, there was nevetheless an adventure in the nature of trade which was assessable to tax under case I of Schedule D. The Commissioners were directed to hear further arguments on this point before stating a supplementary case. After remand, the Commissioners adhered to their earlier view and stated that they were of opinion that the transaction was an isolated case and not taxable and so they discharged the assessments. With the statement of this supplementary case, the matter was argued before the Chancery Division again. Wynn-Parry, J., who delivered the judgment on this occasion referred to the earlier decisions of the Court of Appeal and held that

"on those authorities *prima facie* the matter is concluded by the decision of the Commissioners that the transcation, the subject-matter of the case, was not an adventure in the nature of trade".

Then the learned Judge examined the question as to whether the decision of the Commissioners can be said to be perverse; and held that it could not be so characterised. In the result the appeal was dismissed. The question then reached the Court of Appeal but the result was the same. The Court of Appeal observed that the earlier decisions were binding on it no less than the Court of First Instance; and so it held that the conclusion of the Commissioners was a finding of fact which the Court cannot disturb. However, it is apparent from the discussion that took place when the Court granted leave to the Crown to take the matter to the House of Lords that the Court did not not feel happy about the correctness of the finding made by the General Commissioners in case. That is how the matter reached the House of Lords.

The facts in this case were so clearly against the finding of the Commissioners that Viscount Simonds made it clear at the outset that in his opinion,

"whatever test is adopted, that is whether the finding that the transaction was not an adventure in the nature of trade is to be regarded as a pure finding of fact or as the determination of the question of law or of mixed law and fact, the same result would be reached in this case. The determination cannot stand. This appeal must be allowed and the assessments must be confirmed".

It is in the light of this emphatic statement that the rest of the judgment of Viscount Simonds must be considered. He referred to the divergence of views expressed in English and Scottish decisions and his conclusion was that

"if and so far as there is any divergence between the English and Scottish approach, it is the former which is supported by the previous authority of this House to which reference has been made";

but he analysed the position involved in both the approaches and held that the difference between them was not of substance.

"To say that a transaction is or is not an adventure in the nature of trade",

observed Viscount Simonds,

"is to say that it has or has not the characteristics which distinguish such an adventure, but it is a question of law not of fact what are those characteristics, or, in other words, what the statutory language means. It follows that the inference can only be regarded as an inference of fact if it is assumed that the Tribunal which makes it is rightly directed in law what the characteristics are and that, I think, is the assumption that is made".

Dealing with the merits of the case, Viscount Simonds observed that

"sometimes, as in the case as it now comes before the Court where all the admitted or found facts point one way and the inference is the other way, it can only be a matter of conjecture why that inference has been made. In such a case it is easy either to say that the Commissioners have made a wrong inference of fact because they have misdirected themselves in law or to take a short-cut and say that they have made a wrong inference of law, and I venture to doubt whether there is more than this in the divergence between the two jurisdictions which has so much agitated the Revenue authorities."

Lord Radcliffe substantially agreed with this view. He also referred to the divergence of views expressed in Scottish and English decisions and observed that

"the true position of the Court in all these cases can be shortly stated. If a party to a hearing before the Commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of themselves being findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the case comes before the Court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If a case contains anything *ex facie* which is bad in point of law and which bears upon the determination, it is obviously, erroneous in point of law. But, without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the Court must intervene". Lord Radcliffe remarked that the English Courts had been led to be rather overready to treat these questions as pure questions of fact and added "if so I would say with every great respect that I think it a pity that such a tendency should persist".

Therefore, it seems to us that in effect this decision is not inconsistent with the view we have taken about the character of the question raised before us in the present appeal. As we have alreacy indicated, to avoid confusion or unnecessary complications it would be safer and more convenient to describe the question about the character of the transaction in the context as a question of mixed law and fact.

The learned Attorney-General has invited our attention to the fact that the form in which the question referred to the High Court has been framed in the present case seems to assume that the impugned finding is a finding of fact. It is only in regard to a finding of fact that a question can be properly framed as to whether there was material to support the said finding. We would, therefore, like to add that it would be more appropriate to frame the question in this form ; whether, on the facts and circumstances proved in the case, the inference that the transaction in question is an adventure in the nature of trade is in law justified ? In substance, that is the basis on which the question has been framed by the respondent and considered by the High Court.

This question has been the subject-matter of several judicial decisions ; and in dealing with it all the Judges appear to be agreed that no principle can be evolved which would govern the decision of all cases in which the character of the impugned transaction falls to be considered. When section 2, sub-section (4), refers to an adventure in the nature of trade it clearly suggests that the transaction cannot properly be regarded as trade or business. It is allied to transaction that constitute trade or business but may not be trade or business itself. It is characterised by some of the essential features that make up trade or business but not by all of them ; and so, even an isolated transaction can satisfy the description of an adventure in the nature of trade. Sometimes it is said that a single plunge in the waters of trade may partake of the character of an adventure in the nature of trade. This statement may be true; but in its application due regard must be shown to the requirement that the single plunge must be in the waters of trade. In other words, at least some of the essential features of trade must be present in the isolated or single transaction. On the other hand, it is sometimes said that the appearance of one swallow does not make a summer. This may be true if, in the metaphor, summer represents trade ; but it may not be true if summer represents an adventure in the nature of trade because, when the section refers to an adventure in the nature of trade, it is obviously referring to transactions which individually cannot themselves be described as trade or business but are essentially of such a similar character that they are treated as in the nature of trade. It was faintly argued for the appellant that it would be difficult to regard a single or an isolated transaction as one in the nature of trade because income resulting from it would inevitably lack the characteristics attributed to it by Sir George Loundes in *Commissioner of I.T.* v. *Shaw, Wallace & Co.*[1]

"Income their Lordships think",

observed Sir George Loundes,

1. (1932) 63 M.L.J. 124 : L.R. 59 I.A. 206 (P.C.).

" in this Act connotes a periodical monetary return coming in with some sort of regularity or expected regularity from definite sources".

Then the learned Judge proceeded to observe that

" income has been likened pictorially to the fruit of a tree, or the crop of a field. It is essentially the produce of something which is often loosely spoken of as capital ".

In our opinion, it would be unreasonable to apply the test involved in the use of this pictorial language to the decision of the question as to whether a single or an isolated transaction can be regarded as an adventure in the nature of trade. In this connection we may, with respect, refer to the comment made by Lord Wright in *Raja Bahadur Kamakshya Narain Singh of Ramgarh* v. *Commissioner of I.T., Bihar and Orissa*[1], that

" it is clear that such picturesque similies cannot be used to limit the true character of income in general '.

We are inclined to think that, in dealing with the very prosaic and sometimes complex questions arising under the Income-tax Act, use of metaphors, however poetic and picturesque, may not help to clarify the position but may instead introduce an unnecessary element of confusion or doubt.

As we have already observed it is impossible to evolve any formula which can be applied in determining the character of isolated transactions which come before the Courts in tax proceedings. It would besides be inexpedient to make any attempt to evolve such a rule or formula. Generally speaking, it would not be difficult to decide whether a given transaction is an adventure in the nature of trade, or not. It is the cases on the border line that cause difficulty. If a person invests money in land intending to hold it, enjoys its income for some time, and then sells it at a profit, it would be a clear case of capital accretion and not profit derived from an adventure in the nature of trade. Cases of realisation of investments consisting of purchase and resale, though profitable, are clearly outside the domain of adventures in the nature of trade. In deciding the character of such transactions several factors are treated as relevant. Was the purchaser a trader and were the purchase of the commodity and its re-sale allied to his usual trade or business or incidental to it ? Affirmative answers to these questions may furnish relevant data for determining the character of the transaction. What is the nature of the commodity purchased and resold and in what quantity was it purchased and resold ? If the commodity purchased is generally the subject-matter of trade, and if it is purchased in very large quantities, it would tend to eliminate the possibility of investment for personal use, possession or enjoyment. Did the purchaser by any act subsequent to the purchase improve the quality of the commodity purchased and thereby made it more readily resaleable? What were the incidents associated with the purchase and resale? Where they similar to the operations usually associated with trade or business ? Are the transactions of purchase and sale repeated ? In regard to the purchase of the commodity and its subsequent possession by the purchaser, does the element of pride of possession come into the picture ? A person may purchase a piece of art, hold it for some time and if a profitable offer is received may sell it. During the time that the purchaser had its possession he may be able to claim pride of possession and aesthetic satisfaction; and if such a claim is upheld that would be a factor against the contention that the transaction is in the nature of trade. These and other considerations are set out and discussed in judicial decisions which deal with the character of transactions alleged to be in the nature of trade. In considering these decisions it would be necessary to remember that they do not purport to lay down any general or universal test. The presence of all the relevant circumstances mentioned in any of them may help the Court to draw a similar inference; but it is not a matter of merely counting the number of facts and circumstances pro and con ; what is important to consider is their distinctive character. In each case, it is the total effect of all relevant factors and circumstances that determines the character of the transaction ; and so, though we

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1. (1943) 2 M.L.J. 410 : L.R. 70 I.A. 180, 193 (P.C.).

may attempt to derive some assistance from decisions bearing on this point, we cannot seek to deduce any rule from them and mechanically apply it to the facts before us.

In this connection it would be relevant to refer to another test which is sometimes applied in determining the character of the transaction. Was the purchase made with the intention to resell it at a profit? It is often said that a transaction of purchase followed by resale can either be an investment or an adventure in the nature of trade. There is no middle course and no half-way house. This statement may be broadly true; and so some judicial decisions apply the test of the initial intention to resell in distinguishing adventures in the nature of trade from transactions of investment. Even in the application of this test distinction will have to be made between initital intention to resell at a profit which is present but not dominant or sole; in other words, cases do often arise where the purchaser may be willing and may intend to sell the property purchased at profit, but he would also intend and be willing to hold and enjoy it if a really high price is not offered. The intention to resell may in such cases be coupled with the intention to hold the property. Cases may, however, arise where the purchase has been made solely and exclusively with the intention to resell at a profit and the purchaser has no intention of holding the property for himself or otherwise enjoying or using it. The presence of such an intention is no doubt a relevant factor and unless it is offset by the presence of other factors it would raise a strong presumption that the transaction is an adventure in the nature of trade. Even so, the presumption is not conclusive; and it is conceivable that, on considering all the facts and circumstances in the case, the Court may, despite the said initial intention, be inclined to hold that the transaction was not an adventure in the nature of trade. We thus come back to the same position and that is that the decision about the character of a transaction in the context cannot be based solely on the application of any abstract rule, principle or test and must in every case depend upon all the relevant facts and circumstances.

Let us now consider some of the decisions to which our attention was invited. Normally the purchase of land represents investment of money in land; but where a company is formed for the purpose *inter alia* of acquiring and reselling mining property, and after acquiring and working various property, it resells the whole to a second company receiving payment in fully paid shares of latter company, it was held in *The Californian Copper Syndicate (Limited and Reduced)* v. *Harris (Surveyor of Taxes)*[1] that the difference between the purchase price and the value of the shares for which the property was exchanged is a profit assessable to income-tax. In this case Lord Justice Clerk has observed that

> "it is quite a well-settled principle in dealing with the question of assessment of Income-tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it tnan he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income-tax Act";

and he added that

> "it is equally well-established that the enhanced value obtained from realisation or conversion of security may be so assessable where what is done is not merely a realisation or a change of investment but an act done in what is truely the carrying on or carrying out of a business.".

This was a clear case where the company was held to be carrying on the business of purchase and sale of mining property.

Where land purchased, and subsequently developed, with the object of making it more readily saleable, was sold at a profit, the intention of the assessee was treated to be not to hold the land as an investment, but as a trading asset in *Cayzer, Irvine & Co., Ltd.* v. *Commissioners of Inland Revenue*[2]. In his judgment, Lord President Normand referred to the large development expenditure incurred by the assessee to improve the property and observed that it appeared to be on the whole consistent with the idea that it was carrying on a trade in land rather than with the idea that it was throughout holding it as an investment only to be realised if at all when it desired

1. (1904) 5 T.C. 159.
2. (1942) 24 T.C. 491.

to meet some financial need. In repelling the plea that the transaction showed investment, the Lord President added that the Commissioners " with their knowledge and experience of these matters, have come to the conclusion that the intention was to hold this estate not as an investment but as a trading asset and in order to develop it and to market it." It would thus appear that the conduct of the assessee in incurring a large amount of expenditure on the development of land consisting mainly in the construction of roads and sewers was held to justify the inference that the transaction was an adventure in the nature of trade, though the property purchased and sold was land.

In the *Commissioners of Inland Revenue* v. *Livingston*[1], the assessees-respondents were a ship reapairer, a blacksmith and a fish salesmen's employee ; they purchased as a joint venture a cargo vessel with a view to converting it into a steam-drifter and selling it. They were not connected in business and they had never previously bought a ship. After the ship was purchased, extensive repairs and alterations were carried out by the orders of the respondents and the ship was then sold at a profit. It was held that the profit arising from the transaction was assessable to income-tax under Case I of Schedule D. Lord President Clyde said that in deciding whether the profits in question were taxable, regard must be had to the character and circumstances of the particular venture. " If the venture was one consisting simply in an isolated purchase of some article against an expected rise in price and a subsequent sale", observed the Lord President, "it might be impossible to say that the venture was in the nature of trade". According to him the test to be applied would be whether the operations involved in the transaction are of the same kind and carried on in the same way as those which are characteristic of ordinary trading in the line of business in which the venture was made. If they are, there was no reason why the venture should not be regarded as in the nature of trade merely because it was a single venture which took only three months to complete. Reference was then made to the steps taken by the assessees to buy a second-hand vessel and to convert into a marketable drifter ; and it was stated that the profit made by the venture arose not from the mere appreciation of the capital value of an isolated purchase for resale but from the expenditure on the subject purchased, of money laid out upon it for the purpose of making it marketable at a profit. "That", said the Lord President, " was the very essence of trade ". It was in this connection that the Lord President observed that the appearance of a single swallow does not make a summer. It would thus be noticed that this decision was based substantially on the ground that after the ship was purchased the assessees bestowed labour and money on converting it into a marketable drifter and that imprinted upon the transaction the character of trade. It is true that some of the observaions made by the Lord President would indicate that from the intention to resell at a profit it would be impossible to attribute to the transaction the character of an adventure in the nature of trade. However, as we will presently point out these observations have been explained by the Lord President himself subsequently in *Rutledge* v. *Commissioners of Inland Revenue*[2]; and it is to this case that we will now refer.

In the case of *Rutledge*[2], the appellant was a money-lender who was also interested in a cinema company in 1920. Since that time he had been interested in various businesses. He was in Berlin in 1920 on business connected with the cinema company where he was offered an opportunity of purchasing very cheaply a large quantity of paper. He effected the purchase and within a short time after his return to England he sold the whole consignment to one person at a considerable profit. This profit was held liable to assessment to income-tax, Schedule D, and to excess profits duty as being profit of an adventure in the nature of trade. This assessment was the subject-matter of an appeal before the Court of Appeal, and on behalf of the appellant the observations made by the Lord President Clyde in the case of *Livingston*[1] were pressed into service ; but the Lord President did not accept the plea based on his earlier observations because he said that the said observations were intended to show that a single transaction fell far short of constituting a dealer's trade ; whereas,

1. (1926) 11 T.C. 538.
2. (1929) 14 T.C. 490.

in the present case, the question was whether the transaction was an adventure in the nature of trade. The Lord President agreed that mere intention is not enough to invest a transaction with the character of trade but he added that, if the purchase is made for no purpose except that of resale at a profit, there seems little difficulty in arriving at the conclusion that the deal was in the nature of trade though it may be wholly insufficient to constitute by itself a trade. Then he referred to the illustration which he had cited in his earlier decision about the purchase of a picture and observed that if a picture was purchased to embellish the purchaser's own house for a time, he might sell it if the anticipated appreciation in the value ultimately realised itself. " In such a case", says the Lord President, "I pointed out that it *might* be impossible to affirm that the purchase and sale constituted an adventure in the nature of trade although, again, the crisis of judgment might turn on the particular circumstances". It would thus be clear that the strong observations made by the Lord President in the case of *Livingston*[1] must be considered in the light of the clarification made by him in this case. Lord Sands, who agreed with the Lord President has thus observed :

"Your Lordship in the Chair has indicated that there may be cases of purchase and resale at a profit where the transaction cannot be said to be in the nature of trade. In particular, this may be the case where there is no definite intention of reselling when the purchase is made."

This decision, therefore, shows that where the assessee purchased a very large quantity of paper with the intention to sell it at profit the transaction was treated as an adventure in the nature of trade. It was held to be a most successful adventure on the part of the assessee and having regard to the circumstances attending the purchase and sale it was treated as an adventure in the nature of trade.

In *T. Beynon & Co., Ltd* v. *Ogg*[2] the Court was dealing with the case of a company which was carrying on business as coal merchants, ship and insurance brokers and as sole selling agent for various colliery companies in which latter capacity it was a part of its duty to purchase wagons on its own account as a speculation and subsequently to dispose of them at a profit. The assessee contended that the transaction of purchase and sale being an isolated one the profit was in the nature of a capital profit on the sale of an investment and should be excluded in computing its liability to income-tax. The Court held that the profit realised was made in the operation of the company's business and was properly included in the computation of company's profits for assessment under schedule D. It appears that, in 1914, acting as agent on behalf of two colliery companies, the assessee had purchased two lots of wagons each of which consisted of 250 wagons. During the course of negotiations the assessee, foreseeing that the cost of material and wages was likely to increase, determined to buy a third lot of 250 wagons for itself and did eventually purchase it. In July, 1915, the assessee sold this lot and made a profit of £ 2,500. The question which arose for decision was whether this sum was chargeable to income-tax. In dealing with the argument that as an isolated transaction the profit arising out of it was not chargeable to tax, Sankey, J., observed that he thought "in most cases an isolated transaction does not fall to be chargeable". But he added "you have to consider the transaction and you cannot lay it down as a matter of law without regard to the circumstances that in this case the £ 2,500 is not chargeable". Then the learned Judge considered that the number of wagons purchased was large and held that the other circumstances attending the purchase and sale of the said wagons showed that " this transaction was a transaction, and this profit was a profit" with the result that it made the operation of the assessee in that behalf its business. The learned Judge, however, added a word of caution that he did not think it desirable to lay down any rule as to where the line ought to be drawn, and that it was not even possible to lay down such a rule. " But", said the learned Judge, " it is perfectly easy to say whether Case A or Case B falls on the one side or the other."

In the *Balgownie Land Trust, Ltd.* v. *The Commissioners of Inland Revenue*[3], the owner of a landed estate, at his death, had left his estate to trustees with a direction

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1. (1926) 11 T.C. 538.
2. (1918) 7 T.C. 125.
3. (1929) 14 T.C. 684.

to realise. The trustees were not successful in their efforts to sell the estate in the market. So they formed a company with general powers to deal in real property and transferred the estate to this company in exchange for shares which were allotted to the beneficiaries under the trust and were at the date of the appeal still mainly held by those beneficiaries or their representatives. Soon after its incorporation the purchaser company made a substantial purchase of some other property acquired by borrowing on the security of the original estate. The company received rents and paid a regular dividend on its capital. In 1921 and the following years parts of the original estate were sold and in 1925 the whole of the additional property was sold. When the profits realised by the sales were taxed under Schedule D for the year 1926-27, the assessee contended that the transactions in question were not in the nature of trade and the profits arising therefrom cannot be taxed. This contention was negativeed by the General Commissioners whereupon the assessee appealed. Lord President Clyde described the problem raised by the assessee as one of the most familiar problems under Case I of Schedule D and observed that

> " a single plunge may be enough provided it is shown to the satisfaction of the Court that the plunge is made in the waters of trade; but the sale of a piece of property—if that is all that is involved in the plunge—may easily fall short of anything in the nature of trade. Transactions of sale are characteristic of trade, but they are not necessarily distinctive of it; much depends on the circumstances".

Then the conduct of the assessee after its incorporation was considered and it was held that the purchase of the property in substance amounted to a launching forth *albeit* not in a very large scale. In the result the finding of the Commissioners was confirmed and the proftt was held liable to tax.

In *Martin* v. *Lowry*[1], the House of Lords was considering a case of a wholesale agricultural machinery merchant who had never had any connection with the linen trade purchasing from the Government the whole of its surplus stock of aeroplane linen (some 44 million yards) at a fixed price per yard. The contract of purchase provided in detail as to delivery, and the payment of the price. The purchaser failed in his original attempts to sell the whole of the linen to Belfast linen manufacturers outright. Then he sought to bring pressure on them by placing the linen for sale to the public. It led to an extensive advertising campaign, renting of offices and engaging advertising manager, a linen expert as adviser and a staff of clerks. Sales then proceeded rapidly and soon the whole stocks were disposed of. In all 4,279 orders were received from 1,280 purchasers. As essment to income-tax and excess profits duty were made upon the assessee in respect of profits of the t ansaction. It was held that the dealings of the assessee in linen constituted the carrying on of a trade of which the profits were chargeable to income-tax and excess profits duty. One of the points raised before the House of Lords was that the assessee did not carry on trade or business but only engaged in a single adventure not involving trading operation. In rejecting this contention, Viscount Cave L.C. observed that :

> " the Commissioners have found as a fact that he did carry on trade, and they set out in the Case ample material upon which they could come to that conclusion ".

He added that, indeed, having regard to the methods adopted for the resale of the linen, to the number of operations into which the assessee entered and to the time occupied by the resale, he did not himself see how they could have come to any other conclusion. The other point raised in the appeal was that the profits in question did not come within the description of annual profits or gains but we are not concerned with that point.

In *F. A. Lindsay, A. E. Woodward and W. Hiscox* v. *Commissioners of Inland Revenue*[2], the appellant L, a wine merchant, had on hand a large quantity of American rye whisky. He invited the appellants W. & H who were also engaged in the wine trade to join with him in a venture of shipping the whisky to the United States. It was agreed that W & H should contribute certain sums towards expenses and

1. (1926) 11 T.C. 297.
2. (1932) 18 T.C. 43.

that the profits should be shared in certain proportions. The agreement was not reduced to writing. The shipping of the whisky was arranged by L with consultation with W & H and was carried out gradually over a period of two years. From time to time W & H met L who told them that the whisky had been successfully shipped to the United States and sold there profitably. Subsequently the appellants decided to discontinue the export of whisky and to employ the monies which they had accumulated in the purchase with a view to resale of a wine business in Portugal. In respect of the profits made by the appellants from the sale of wine an assessment was made on them jointly for 1922-1923. The Special Commissioners found that a partnership or joint venture subsisted between the appellants and that the profits of the sales of whisky were assessable to income-tax. The Lord President Clyde rejected the appellant's contention and observed that :

> "the nature of the transaction—apart from the fraudulent breaches of law which were inherent in it—was neither more nor less than the commercial disposal of a quantity of rye whisky ".

In point of fact the disposal was not effected by a single transaction but extended over a year and more ; and so it could not fall outside the sphere of trade. This was a clear case where a large number of distinctive features of trade were associated with the transaction.

The transaction of the purchase and sale of whisky was again brought before the Court for its decision in the *Commissioners of Inland Revenue* v. *Fraser*[1]. In this case the assessee, a woodcutter brought through an agent for resale whisky in bond for £ 407. Nearly three years thereafter the whisky was sold at a profit for £ 1,131. This was the assessee's sole dealing in whisky. He had no special knowledge of the trade and he did not take delivery of the whisky nor did he have it blended and advertised. Even so, it was held that the transaction was an adventure in the nature of trade. It may be mentioned that when the matter was first taken before the Commissioners they took the view that an adventure in the nature of trade had not been carried on by the assessee, that merely an investment had been made and subsequently realised and so the profit was not assessable to income-tax. This view was, however, reversed by the First Division of the Court of Session and it was held that in coming to the conclusion the Commissioners had misdirected themselves as to the meaning of "being engaged in an adventure in the nature of trade". The Lord President Normand conceded that it would be extremely difficult to hold that a single transaction amounted to a trade but he added that it may be much less difficult to hold that a single transaction was an adventure in the nature of trade. " There was much discussion ", observed the Lord President ," as to the criterion which the Court should apply. I doubt if it would be possible to formulate a single criterion ". The following observations made by the Lord President in this connection may be usefully quoted :

> " It is in general more easy to hold that a single transaction entered into by an individual in the line of his own trade (although not part and parcel of his ordinary business) is an adventure in the nature of trade than to hold that a transaction entered into by an individual outside the line of his own trade or occupation is an adventure in the nature of trade. But what is a good deal more important is the nature of the transaction with reference to the commodity dealt in. The individual who enters into a purchase of an article or commodity may have in view the resale of it at a profit, and yet it may be that that is not the only purpose for which he purchased the article or the commodity nor the only purpose to which he might turn it if favourable opportunity of sale does not occur. In some of the cases the purchase of a picture has been given as an illustration. An amateur may purchase a picture with a view to its resale at a profit, and yet he may recognise at the time or afterwards that the possession of the picture will give him aesthetic enjoyment if he is unable ultimately or at his chosen time, to realise it at a profit. A man may purchase stocks and shares with a view to selling them at an early date at a profit, but, if he does so, he is purchasing something which is itself an investment, a potential source of revenue to him while he holds it. A man may purchase land with a view to realising it at a profit, but it also may yield him an income while he continues to hold it. If he continues to hold it, theere may be also a certain pride of possession. But the purchaser of a large quantity of a commodity like whisky, greatly in excess of what could be used by himself, his family and friends, a commodity which yields no pride of possession, which cannot be turned to account except by a process of realisation, I can scarcely consider to be other than an adventurer in a transaction in the nature of a trade; and I can find no single fact among those stated by the Commis-

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1. (1942) 24 T.C. 498.

sioner which in any way traverses that view. In my opinion the fact that the transaction was not in the way of business (whatever it was) of the Respondent in no way alters the character which almost necessarily belongs to a transaction like this. Most important of all, the actual dealings of the Respondent with the whisky were exactly of the kind that take place in ordinary trade."

These observations indicate some of the important considerations which are to be borne in mind in determining the character of a single transaction.

We may now refer to the decision of the House of Lords in *Leeming* v. *Jones*[1]. In this case the appellant was a member of a syndicate of four persons formed to acquire an option over a rubber estate with a view to resell it at a profit. The option was secured but the estate was considered too small for a resale to a company for public floatation. An option over another adjoining estate was accordingly secured and it was decided to resell the two estates to a public company to be formed for the purpose. Another member of the syndicate undertook to arange for the promotion of this company. The syndicate's total receipts resulting from the transactions in respect of the estates amounted to £3,000 and the balance remaining, after deduction of certain expenses, was divided between the members. The appellant was assessed to income-tax, Schedule D, in respect of his share. The General Commissioners held that the appellant acquired the property or interest in the property in question with the sole object of turning it over again at a profit and that he at no time had any intention of holding it as an investment. That is why they confirmed the assessment. After the case was heard before the King's Bench Division it was remitted to the General Commissioners for a finding as to whether there was or was not a concern in the nature of trade. The Commissioners then found that the transaction in question was not a concern in the nature of trade and that there was no liability to assessment. It may be pointed out that in remitting the case for the reconsideration of the General Commissioners, Rowlatt, J., had observed that it was quite clear that what the Commissioners had got to find was whether there was a concern in the nature of trade and all that they had found was that the property was acquired with the sole object of turning it over again at a profit and without any intention of holding it as an investment. "That describes", said Rowlatt, J., "what a man does if he buys a picture that he sees going cheap at Christie's because he knows that in a month he will sell it again at Christie's". "That", according to the learned Judge, "is not carrying on trade" and "so what the Commissioners must do is to say, one way or the other, was this, I will not say carrying on a trade, but was it a speculation or an adventure in the nature of trade". The learned Judge no doubt added that he did not indicate which way the finding ought to be, but he commended the Commissioners to consider what took place in the nature of organising the speculation, maturing the property and disposing of the property, and when they have considered all that, to say whether they think it was an adventure in the nature of trade or not. It is thus clear that Rowlatt, J., indicated clearly though in cautious words what he thought was the true nature of the transaction made. Even so, on reconsideration of the matter the Commissioners returned a finding in favour of the assessee. After the finding was returned, Rowlatt, J., held that he must abide by his own decision in *Pearm* v. *Miller*[2], and so the appeal was allowed. The matter was then taken to the Court of Appeal where the revised finding of the Commissioners was treated as a finding on a question of fact not open to challenge and the point which was considered at length was whether even if the transaction was not an adventure in the nature of trade, could the profit resulting from it be taxed under Case VI? The Master of the Rolls Lord Hanworth traced the history of the dispute, mentioned how Mr. Justice Rowlatt had indicated to the Commissioners what they had to consider in determining the question remitted to them and observed that:

"Mr. Justice Rowlatt, and I think this Court, might perhaps have taken the course of saying that having regard to what he had called attention to in this case, the particular facts, of organising the speculation, of maturing the property, and the diligence in discovering a second property to add to the first, and the disposing of the property, there ought to be and there must be a finding that it

1. (1930) 15 T.C. 333. 2. (1927) 11 T.C. 610.

was an adventure in the nature of trade; but Mr. Justice Rowlatt withheld his hand from so doing and I think he was right, for however strongly one may feel as to the facts, the facts are for the decision of the Commissioners ".

It would thus be clear that the decision of the Commissioners appeared both to Rowlatt, J., and the Court of Appeal to be erroneous. Even so, they refused to interfere with it on the ground that it was a decision on a question of fact. We may, with respect, recall that it was in regard to this approach that Lord Radcliffe observed in the case of *Edwards*[1], that:

" it was a pity that such a tendency should persist to treat the findings of the Commissioners on the question as to the character of the transction as conclusive".

In dealing with the question as to whether if Case I did not apply Case VI could apply, Lord Justice Lawrence observed that:

" in the case of an isolated transaction of purchase and resale of property there is really no middle course open. It is either an adventure in the nature of trade, or else it is simply a case of sale and resale of property ".

The Court of Appeal held that if the transaction did not fall in Case I it was difficult to see how it could fall under Case VI. The discussion on this part of the case is, however, not relevant for our purpose. This decision of the Court of Appeal was taken before the House of Lords and the question debated before the House of Lords was about the application of Case VI to the transaction. The House of Lords affirmed the view taken by the Court of Appeal and held that:

" Case VI was inappliable because Case VI necessarily refers to the words of Schedule D, that is to say, it must be a case of annual profits and gains and those words again are ruled by the first section of the Act which says that when an Act indicates that income-tax shall be charged for any year at any rate the tax at that rate shall be charged in respect of the profits and gains according to the Schedules ".

Lord Buckmaster agreed with the observations of Lord Justice Lawrence that there can be no middle course open in such cases. Viscount Dunedin, in concurring with the opinion of Lord Buckmaster, dealt with the several arguments urged by the Crown but the observations made by him with regard to the last argument are relevant for our purpose. " The last argument of the counsel for the Crown " observed Viscount Dunedin, " was that there was a finding that the respondent never meant to hold the land bought as an investment. The fact that a man does not mean to hold an investment may be an item of evidence tending to show whether he is carrying on a trade or concern in the nature of trade in respect of his investment but *per se* it leads to no conclusion whatever ". According to Viscount Dunedin, recourse to Case VI ignores the fact that it had been settled again and again that Case VI does not suggest that anything that is a profit or gain falls to be taxed.

The observations made by Viscount Dunedin were considered in the *Commissioners of Inland Revenue* v. *Reinhold*[2]. We ought to add that the appellant has placed strong reliance on this decision. In this case, the respondent was a director of a company carrying on a business of warehousemen; he bought four houses in January, 1945 and sold them at a profit in December, 1947. He admitted that he had bought the property with a view to resale and had instructed his agents to sell whenever a suitable opportunity arose. The profits made by him on resale were assessed to tax. On appeal before the General Commissioners he contended that the profit on resale was not taxable. The Crown urged that the transaction was an adventure in the nature of trade and that profits arising therefrom were chargeable to tax. The General Commissioners being equally divided allowed the appeal and discharged the assessment. It was on these facts that the matte was then taken before the First Division of the Court of Session and it was urged on behalf of the Crown that the initial intention of the assessee clearly was to sell the property at a profit and so the view taken by the General Commissioners about

1. (1955) 28 I.T.R. 579 : 36 T.C. 207. 2. (1953) 34 T.C. 389.

the character of the transaction was erroneous. This argument was, however, rejected and the order of discharge passed by the General Commissioners was confirmed. When the Crown referred to the observations of Lord Dunedin in the case of *Leeming*[1], which we have already cited, Lord Carmont observed that he did not wish to read the said passage out of its context and without regard to the facts of the case then under consideration. Then Lord Carmont added that though the language used by Lord Dunedin " may cover the purchase of houses", it " would not cover a situation in which a purchaser bought a commodity which from its nature can give no annual return ". " This comment of mine " said Lord Carmont "is just another way of saying that certain transactions shew inherently that they are not investments but incursions into the realm of trade or adventures of that nature". Then reference was made to the fact that the assessee was a warehouse company director and not a property agent or speculator and that the only purchases of property with which he was concerned were two separated by ten years and that the first heritage was acquired without the intention to sell, which only arose fortuitously. His Lordship then put his conclusion in this way ;

> " I would therefore say that Commissioners of Inland Revenue have failed to prove—and the onus is on them—the case they sought to make out ".

According to Lord Carmont, Lord Dunedin's observations do not suggest that the initial declaration of intention *per se* leads to the conclusion that the transaction was in the nature of trade. He thought that much more was required to show that the assessee was engaged in an adventure in the nature of trade than was proved in the case before the Court. Lord Russell, who concurred with this opinion, began with the observation that

> "*prima facie* the difference of opinion among the General Commissioners suggests that the case is a narrow one and that the onus on the appellants of showing that the transaction was an adventure in the nature of trade is not a light one ".

Lord Russell then mentioned the argument of the Lord Advocate that if a person buys anything with a view to sale that is a transaction in the nature of trade because the purpose of the acquisition in the mind of the purchaser is all-important and conclusive ; and that the nature of the thing purchased and the other surrounding circumstances do not and cannot operate so as to render the transaction other than an adventure in the nature of trade, and observed that in his opinion the argument so formulated " is too absolute and is not supported by the judicial pronouncements on which it was sought to be raised." He then referred to the variety of circumstances which are or may be relevant to the determination of such a question ; and he concluded with the observation that the appellants had not discharged the burden of showing that the transaction was an adventure in the nature of trade. Lord Keith also took the same view and stated that " the facts were, in his opinion, insufficient to establish that this was an adventure in the nature of trade ". This case was no doubt a case on the border line ; and if we may say so with respect it was perhaps nearer an adventure in the nature of trade than otherwise. It would not be unreasonable to suggest that, in this case, if the Commissioners had found that the transaction was an adventure in the nature of trade, the Court would probably not have interfered with the said conclusion ; but the Commissioners were equally divided and the assessment had been discharged by them. It was under these circumstances that the point about the onus of proof became a matter of substance ; and, as we have already pointed out, all the learned Judges have emphasized that the onus had not been discharged and that no case had been made out for reversing the order of discharge passed by the Commissioners. However that may be, it would, we think, be unsafe to treat this case as laying down any general proposition the application of which would assist the appellant before us. We would also like to add that there can be no doubt that Lord Russell's criticism against the contention raised by the Lord Advocate was fully justified because the contention as raised clearly overstated the significance and effect of the initial

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1. (1930) 15 T.C. 333.

intention. As we have already pointed out, if it is shown that, in purchasing the commodity in question, the assessee was actuated by the sole intention to sell it at a profit, that no doubt is a relevant circumstance which would raise a strong presumption that the purchase and subsequent sale are an adventure in the nature of trade ; but the said presumption is not conclusive and it may be rebutted or offset by other relevant circumstances.

What then are the relevant facts in the present case ? The property purchased and resold is land and it must be conceded in favour of the appellant that land is generally the subject-matter of investment. It is contended by Mr. Viswanatha Sastri that the four purchases made by the appellant represent nothing more than an investment and if by resale some profit was realised that cannot impress the transaction with the character of an adventure in the nature of trade. The appellant, however, is a firm and it was not a part of its ordinary business to make investment in lands. Besides, when the first purchase was made it is difficult to treat it as a matter of investment. The property was a small piece of 28¼ cents and it could yield no return whatever to the purchaser. It is clear that this purchase was the first step taken by the appellant in execution of a well-considered plan to acquire open plots near the mills and the whole basis for the plan was to sell the said lands to the mills at a profit. Just as the conduct of the purchaser subsequent to the purchase of a commodity in improving or converting it so as to make it more readily resaleable is a relevant factor in determining the character of the transaction, so would his conduct prior to the purchase be relevant if it shows a design and a purpose. As and when plots adjoining the mills were available for sale, the appellant carried out his plan and consolidated his holding of the said plots. The appellant is the managing agent of the Janardana Mills and probably it was first thought that purchasing the plots in its own name and selling them to the mills may invite criticism and so the first purchase was made by the appellant in the name of its benamidar V. G. Raja. Apparently the appellant changed its mind and took the subsequent sale deeds in its own name. The conduct of the appellant in regard to these plots subsequent to their purchase clearly shows that it was not interested in obtaining any return from them. No doubt the appellant sought to explain its purpose on the ground that it wanted to build tenements for the employees of the mills ; but it had taken no steps in that behalf for the whole of the period during which the plots remained in its possession. Besides, it would not be easy to assume in the case of a firm like the appellant that the acquisition of the open plots could involve any pride of possession to the purchaser. It is really not one transaction of purchase and resale. It is a series of four transactions undertaken by the appellant in pursuance of a scheme and it was after the appellant had consolidated its holdings that at a convenient time it sold the lands to the Janardana Mills in two lots. When the Tribunal found that, as the managing agent of the mills, the appellant was in a position to influence the mills to purchase its properties its view cannot be challenged as unreasonable. If the property had been purchased by the appellant as a matter of investment it would have tried either to cultivate the land, or to build on it ; but the appellant did neither and just allowed the property to remain unutilised except for the net rent of Rs. 80 per annum which it received from the house on one of the plots. The reason given by the appellant for the purchase of the properties by the mills has been rejected by the tribunal ; and so when the mills purchased the properties it is not shown that the sale was occasioned by any special necessity at the time. In the circumstances of the case, the tribunal was obviously right in inferring that the appellant knew that it would be able to sell the lands to the mills whenever it thought it profitable so to do. Thus the appellant purchased the four plots during two years with the sole intention to sell them to the mills at a profit and this intention raises a strong presumption in favour of the view taken by the tribunal. In regard to the other relevant facts and circumstances in the case, none of them offsets or rebuts the presumption arising from the initial intention ; on the other hand, most of them corroborate the said presumption. We must, therefore, hold that the High Court was right in taking the view that, on the

facts and circumstances proved in this case, the transaction in question is an adventure in the nature of trade.

The result is the appeal fails and must be dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—T. L. VENKATARAMA AIYAR, P. B. GAJENDRAGADKAR AND A. K. SARKAR, JJ.

N. T. Veluswami Thevar .. *Appellant**

v.

G. Raja Nainar and others .. *Respondents.*

Representation of the People Act (*XLIII of* 1951), *section* 100 (1) (*c*)—*Construction*—'*Improperly rejected*', *meaning of*—*Scope of enquiry before the Tribunal.*

Constitution of India (1950), *Article* 226—*Petition under*—*Interlocutory orders in Election petitions*—*Interference, if proper*—(*Section* 116-*A of Representation of People Act XLIII of* 1951).

In a petition under Article 226 of the Constitution of India, 1950, the High Court of Madras interfered with the interlocutory orders of the Election Tribunal and issued writs prohibiting the Tribunal from considering grounds of disqualification other than those preferred before the returning officer.

Held on appeal by Special Leave under Artice 136 : It is a sound rule of construction that procedural enactments should be construed liberally and in such manner as to render the enforcement of substantive rights effective. When on a construction of a statute two views are possible, one which results in an anomaly and the other not, it is the duty of Courts to adopt the latter and not the former.

In the context of section 100 (1), (*c*) and (*d*) (i) of Central Act (XLIII of 1951) the improper rejection or acceptance must have reference to section 36 (2) of the said Act and the rejection of the nomination paper of a candidate who is qualified to be chosen for election and who does not suffer from any of the disqualifications mentioned in section 36 (2) would be " improper " within section 100 (1) (*c*).

Reading section 100 (1) (*c*) in the context of the whole enactment an enquiry before the Tribunal must embrace all the matters as to qualification and disqualification mentioned in section 36 (2) and it cannot be limited to the particular ground of disqualification taken before the returning officer (or relied on by him). The proceedings under the section are original proceedings and not in the nature of an appeal against the decision of the Returning Officer.

Raja Nainar v. *Veluswami Thevar*, I.L.R. (1958) Mad. 241 : (1958) 1 M.L.J. 124, reversed.

The jurisdiction of the High Courts to issue writs against orders of the Tribunal is undoubted; but then, it is well settled that where there is another remedy provided, the Court may properly exercise its discretion in declining to interfere under Article 226. A right of appeal against a decision of the Tribunal to the High Court is provided under section 116-A and its intention is obviously that proceedings before the Tribunal should go on with expedition and without interruption and any error in its decision should be set right in an appeal under that section. In this view, it would be a proper exercise of discretion under Article 226 to decline to interfere with interlocutory orders.

Appeals by Special Leave from the Judgment and Order, dated the 21st October, 1957, of the Madras High Court in Writ Petitions Nos. 675 and 676 of 1957.[1]

R. Ganapathy Iyer and *S. B. Adityan*, Advocates and *G. Gopalakrishnan*, Advocate of *Messrs. Gagrat & Co.*, for Appellant.

A. N. Sinha and *P. K. Mukherjee*, Advocates for Respondent No. 1.

The Judgment of the Court was delivered by

Venkatarama Aiyar, J.—These appeals raise a question of considerable importance as to the scope of an enquiry in an election petition wherein election is called

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* C.A. Nos. 231 and 232 of 1958. 24th November, 1958.

1. I.L.R. 1958 Mad. 241 : (1958) 1 M.L.J. 124.

in question under section 100 (1) (*c*) of the Representation of the People Act (XLIII of 1951), on the ground that a nomination paper had been improperly rejected.

The facts are that during the general elections which were held in 1957 six persons including the appellant, Veluswami Thevar, the second respondent, Chellapandian, and the fourth respondent, Arunachalam, were nominated for election to the Legislative Assembly of the State of Madras from Alangulam Constituency in the District of Tirunelveli. At the time of the scrutiny which was on February 1, 1957, Chellapandian raised an objection to the nomination of Arunachalam on the ground that he was the Headmaster of the National Training School, Tiruchendur, which was a Government-aided school, and that he was, therefore, disqualified under section 7, clauses (*d*) and (*e*) of the Representation of the People Act, 1951 (hereinafter referred to as the Act) as holding an office of profit under the Government. In upholding this objection, the returning officer observed :

" Sri S. Arunachalam is not present at the time of scrutiny of nominations nor any authorised agent of his could take notice of the objection and file a reply. In view of the objection which has not been cleared by Sri S. Arunachalam by satisfying me that he is not holding an office of profit in a concern in which the State Government has financial interest, the objection is upheld and Sri S. Arunachalam is disqualified under sections 7 (*d*) and (*e*) of Act XLIII of 1951. Accordingly his nomination is rejected."

The five nomination papers were accepted ; two of the candidates subsequently withdrew from the election ; the other three went to the polls and on March 10, 1957, the appellant who secured the largest number of votes was declared elected.

On April 18, 1957, Raja Nainar, the first respondent, who was not a candidate but a voter filed Election Petition No. 100 of 1957 praying that the election of the appellant be declared void on the ground that the rejection of the nomination paper of Arunachalam was improper, because he had ceased to be a Headmaster at the time of his nomination, and that further the institution was a private one. The appellant filed a written statement in which he pleaded that Arunachalam was not qualified to be chosen not merely on the ground put forward by Chellapandian before the returning officer but also on the grounds that he was interested as a partner in contracts for the execution of works for the Government, and that further he had entered into an agreement with the District Board, Chittoor, to serve as a teacher in that Board, and that his nomination paper was, therefore, rightly rejected. Raja Nainar then came out with the application, I.A. No. 5 of 1957, out of which the present proceedings arise, to strike out the additional grounds of disqualification raised in the statement of the appellant on the ground that the Tribunal had no jurisdiction to enquire into any ground of disqualification which was not taken before the returning officer, and that accordingly the new grounds put forward by the appellant should be struck out.

By its order, dated August 17, 1957, the Tribunal held that the question to be decided by it was whether there was a valid nomination paper, and that to decide that, it could go into grounds other than those which were put forward before the returning officer, and, in that view, dismissed the application. The correctness of this order was challenged by Raja Nainar in two Writ Petitions Nos. 675 and 676 of 1957, preferred under Article 226. Therein he repeated his contention that it was not competent to the Tribunal to enquire into any but the grounds which had been put forward before the returning officer, and prayed that a writ of *certiorari* be issued to quash the order in I.A. No. 5 of 1957 and a writ of prohibition, to restrain the Tribunal from enquiring into the new grounds raised by the appellant.

These applications were heard by a Bench of the Madras High Court consisting of Rajagopalan and Rajagopala Ayyangar, JJ., who upheld the contention of the petitioner, and stated their conclusion in these terms :

"We are clearly of opinion that the enquiry before the Tribunal must be restricted to the objections which the Returning Officer had to consider and decide, but not necessarily to the material placed before the Returning Officer at the stage of the summary enquiry. The Tribunal has jurisdiction to adjudicate upon the truth and validity of those objections on relevant material, even if that

material be other than that placed before the Returning Officer. The Tribunal has no jurisdiction to investigate the truth or validity of the objections which were not put forward before the Returning Officer, and which he had therefore no occasion to consider. Once again we have to point out that we are discussing only the position of a candidate whose nomination was rejected, and not, for instance that of a returned candidate."

A further objection was also taken before the learned Judges that as the decision of the Election Tribunal was open to appeal under section 116-A of the Act, the Court should, in exercise of its discretion under Article 226, decline to entertain writ petitions against interlocutory orders. But the learned Judges held that as the Tribunal had no jurisdiction to entertain grounds other than those which were put forward before the Returning Officer, writs could issue under Article 226. In the result, they quashed the order of the Election Tribunal in I.A. No. 5 of 1957, and issued a writ of *mandamus* directing it to dispose of the application afresh in accordance with law as laid down in the judgment. It is against this judgment that the present appeals have been preferred on leave granted by this Court under Article 136, and the point that arises for decision is whether in an election petition questioning the propriety of the rejection of a nomination paper under section 100 (1) (*c*) of the Act, it is open to the parties to raise grounds of disqualification other than those put forward before the returning officer.

It will be convenient at this stage to refer to the provisions of the Act bearing on this question. Section 32 of the Act provides that:

"Any person may be nominated as a candidate for election to fill a seat if he is qualified to be chosen to fill that seat under the provisions of the Constitution and this Act."

Under section 33 (1), the candidate is to deliver to the returning officer a nomination paper completed in the prescribed form and signed by the candidate and by an elector of the constituency as proposer. Section 33 (4) enacts that:

"On the presentation of a nomination paper, the returning officer shall satisfy himself that the names and electoral roll numbers of the candidate and his proposer as entered in the nomination paper are the same as those entered in the electoral rolls:

Provided that the returning officer shall permit any clerical or technical error in the nomination paper in regard to the said names or numbers to be corrected in order to bring them into conformity with the corresponding entries in the elctoral rolls; and where necessary, direct that any clerical or printing error in the said entries shall be overlooked."

Section 35 provides *inter alia* that the returning officer shall cause to be affixed in some conspicuous place in his office a notice of the nomination containing descriptions similar to those contained in the nomination paper both of the candidate and of the proposer. Section 36, omitting what is not material, is as follows:

"36. (1) On the date fixed for the scrutiny of nominations under section 30, the candidates, their election agents, one proposer of each candidate, and one other person duly authorized in writing by each candidate, but no other person, may attend at such time and place as the returning officer may appoint; and the returning officer shall give them all reasonable facilities for examining the nomination papers of all candidates which have been delivered within the time and in the manner laid down in section 33.

(2) The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination, and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds:—

(*a*) that the candidate either is not qualified or is disqualified for being chosen to fill the seat under any of the following provisions that may be applicable, namely:—

Articles 84, 102, 173 and 191,

Part II of this Act,

or

(*b*) that there has been a failure to comply with any of the provisions of section 33 or section 34; or

(*c*) that the signature of the candidate or the proposer on the nomination paper is not genuine.

....

(5) The returning officer shall hold the scrutiny on the date appointed in this behalf under clause (*b*) of section 30 and shall not allow any adjournment of the proceedings except when such proceedings are interrupted or obstructed by riot or open violence or by causes beyond his control:

Provided that in case an objection is made the candidate concerned may be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny, and the returning officer shall record his decision on the date to which the proceedings have been adjourned.

(6) The returning officer shall endorse on each nomination paper his decision accepting or rejecting the same and, if the nomination paper is rejected, shall record in writing a brief statement of his reasons for such rejection."

Then, we have section 100 (1) (*c*) the construction of which is the main point for determination. It is as follows:

" 100. (1) Subject to the provisions of sub-section (2), if the Tribunal is of opinion—

(*c*) that any nomination has been improperly rejected ; ....

the Tribunal shall declare the election of the returned candidate to be void."

Now, the whole controversy between the parties is as to what the expression " improperly rejected " in section 100 (1) (*c*) means. According to the appellant, when the nomination paper of a candidate who is under no such disqualification as is mentioned in section 36 (2) has been rejected, that is improper rejection within section 100 (1) (*c*). According to the respondent, when the nomination paper of a candidate is rejected by the returning officer on the ground that he is subject to a specified disqualification, the rejection is improper, if it is found that that disqualification does not exist. If the former view is correct, then the scope of an enquiry before the Tribunal must extend to all matters which are mentioned in section 36 (2) and if the latter, then it must be limited to determining whether the ground on which the returning officer has rejected the nomination is well founded. Now, to decide what the expression " improperly rejected " in section 100 (1) (*c*) precisely imports, it is necessary to examine the relevant provisions of the Act bearing on the question and the setting of the above section therein. Under section 32 of the Act, any person may be nominated as a candidate for election if he is duly qualified under the provisions of the Constitution and the Act. Section 36 (2) authorises the returning officer to reject any nomination paper on the ground that he is either not qualified, that is, under sections 3 to 7 of the Act, or is disqualified under the provisions referred to therein. If there are no grounds for rejecting a nomination paper under section 36 (2), then it has to be accepted, and the name of the candidate is to be included in a list. *Vide* section 36 (8). Then, we come to section 100 (1) (*c*) and section 100 (1) (*d*) (i), which provide a remedy to persons who are aggrieved by an order improperly rejecting or improperly accepting any nomination. In the context, it appears to us that the improper rejection or acceptance must have reference to section 36 (2), and that the rejection of a nomination paper of a candidate who is qualified to be chosen for election and who does not suffer from any of the disqualifications mentioned in section 36 (2) would be improper within section 100 (1) (*c*), and that, likewise, acceptance of a nomination paper of a candidate who is not qualified or who is disqualified will equally be improper under section 100 (1) (*d*) (i). Section 32 confers a substantive right on a candidate to be chosen to the legislature subject only to the limitations enacted in Articles 84, 102, 173 and 191 of the Constitution and sections 3 to 7 of the Act, and sections 36 and 100 provide the machinery for the exercise and enforcement of the right. It is a sound rule of construction that procedural enactments should be construed liberally and in such manner as to render the enforcement of substantive rights, effective. Reading section 100 (1) (*c*) in the context of the whole enactment, we think that an enquiry before the Tribunal must embrace all the matters as to qualification and disqualification mentioned in section 36 (2), and that it cannot be limited to the particular ground of disqualification which was taken before the returning officer.

It was contended for the respondent that the proceedings before the Tribunal are really by way of appeal against the decision of the returning officer, and that, therefore, the scope of the enquiry in the election petition must be co-extensive with that before the returning officer, and must be limited to the ground taken before him. It was argued that a decision could be said to be improper only with reference to a ground which was put forward and decided in a particular manner by the returning officer, and that therefore the expression " improperly rejected "

would, in its true connotation, restrict the scope of the enquiry before the Tribunal to the ground taken before the returning officer. We are unable to agree with this contention. The jurisdiction which a Tribunal exercises in hearing an election petition even when it raises a question under section 100 (1) (*c*) is not in the nature of an appeal against the decision of the returning officer. An election petition is an original proceeding instituted by the presentation of a petition under section 81 of the Act. The respondents have a right to file written statements by way of reply to it ; issues have to be framed, and subject to the provision of the Act, the provisions of the Civil Procedure Code regulate the trial of the petition. All the parties have the right to adduce evidence, and that is of the essence of an original proceeding as contrasted with a proceeding by way of appeal. That being the character of the proceedings, the rule applicable is that which governs the trial of all original proceedings ; that is, it is open to a party to put forward all grounds in support of or negation of the claim, subject only to such limitations as may be found in the Act.

It should be noted in this connection that if a petition to set aside an election on the ground of improper rejection of a nomination paper is in the nature of an appeal against the decision of the returning officer, then logically speaking, the decision of the Tribunal must be based only on the materials placed before the returning officer given with respect to the ground which was urged before him, and no fresh evidence could be admitted before the Tribunal except in accordance with Order 41, rule 27. The learned Judges in the Court below, however, observe that though the enquiry before the Tribunal is restricted to the particular ground put forward before the returning officer, it is not restricted to the material placed before him, and that all evidence bearing on that ground could be adduced before the Tribunal. This, in our view, is quite correct. The enquiry which a returning officer has to make under section 36 is summary in character. He may make "such summary enquiry, if any, as he thinks necessary" ; he can act *suo motu*. Such being the nature of the enquiry, the right which is given to a party under section 100 (1) (*c*) and section 100 (1) (*d*) (i) to challenge the propriety of an order of rejection or acceptance of a nomination paper would become illusory, if the Tribunal is to base its decision only on the materials placed before the returning officer.

It was contended for the respondent that even with reference to the ground taken before the returning officer, no evidence other than what was placed before him could be brought before the Tribunal, and he relied on the following observations of the learned Judges in *Charanjit Lal* v. *Lehri Singh*[1] :

> "Whether a nomination has been improperly rejected or not, has to be considered in relation to the state of evidence before the returning officer at the time of the scrutiny. The testimony of the returning officer shows that he rejected the nomination, because it did not appeal to him that on the question of age the candidate Shri Pirthi was qualified to stand for election."

There, a nomination paper had been rejected by the returning officer on the ground that the candidate did not appear to possess the age qualification required by Article 173. The correctness of this order was challenged in an election petition. Evidence was taken as to the age of the candidate in this petition, and eventually it was held that the order of the returning officer was right. In the order of rejection, the returning officer also stated :

> "The nomination is rejected as the age is not mentioned in the nomination paper. Neither the candidate nor the proposer or any person duly authorised on his behalf is present to testify to his age."

Now, the argument before the High Court was that the failure to mention the age in the nomination paper was a formal defect which should have been condoned under section 36 (4) of the Act. The learned Judges held that the defect was not merely one of failure to mention the age but of want of the requisite qualification in age, and

1. A.I.R. 1958 Punj. 433, 435.

that that could not be cured under section 36 (4). In this context, the observations relied on could not be read as meaning that no evidence could be adduced even in respect of a ground which was urged before the returning officer, as, in fact, evidence was taken before the Tribunal and a finding given, and if they meant what the respondent suggests they do, we do not agree with them. It is to be noted that in many of the cases which came before this Court, as for example, *Durga Shankar Mehta* v. *Thakur Raghuraj Singh and others*[1], the finding of the Tribunal was based on fresh evidence admitted before it, and the propriety of such admission was never questioned. And if the true position is, as we have held it is, that it is open to the parties to adduce fresh evidence on the matter in issue, it is difficult to imagine how the proceedings before the Tribunal can be regarded as in the nature of appeal against the decision of the returning officer.

In support of his contention that it is only the ground that is urged before the returning officer that can be raised before the Tribunal, Mr. Sinha, learned counsel for the respondent, relies on the provision in section 36 (6) that when a nomination paper is rejected, the returning officer should record his reasons therefor. The object of this provision, it is argued, is to enable the Tribunal to decide whether the order of the returning officer is right or not, and by implication it confines the scope of the enquiry before the Tribunal to the ground put forward before the returning officer. This contention is, in our opinion, unsound. Now, when a nomination paper is accepted, section 36 (6) does not require that any reason should be recorded therefor. If the contention of the respondent is right, it would follow that acceptance of a nomination paper can never be questioned. But that would be against section 100 (1) (*d*) (i), and it must therefore be held that an acceptance can be questioned on all the grounds available under section 36 (2). Section 100 (1) (*d*) (i) deals with improper acceptance of a nomination paper, and if the word "improper" in that provision has reference to the matters mentioned in section 36 (2), it must have the same connotation in section 100 (1) (*c*) as well. The word "improper" which occurs in both section 100 (1) (*c*) and section 100 (1) (*d*) (i) must bear the same meaning in both the provisions, unless there is something in the context to the contrary and none such has been shown.

There is another difficulty in the way of accepting this argument of the respondent. A candidate may be subject to more than one disqualification, and his nomination paper may be questioned on all those grounds. Supposing that the returning officer upholds one objection and rejects the nomination paper on the basis of that objection without going into other objections, notwithstanding that under section 36 (2) he has to decide all the objections is it open to the respondents in the election petition to adduce evidence on those objections ? According to the respondent, it is not, so that if the decision of the returning officer on the objection on which he rejected the nomination paper is held to be bad, the Tribunal has no option but to set aside the election undder section 100 (1) (*c*), even though the candidate was, in fact, disqualified and his nomination paper was rightly rejected. Mr. Sinha for the respondent concedes that the result would be anomalous, but he says that the Law of Election is full of anomalies, and this is one of them, and that is no reason for not interpreting the law on its own terms. It is no doubt true that if on its true construction, a statute leads to anomalous results, the Courts have no option but to give effect to it and leave it to the legislature to amend and alter the law. But when on a construction of a statute, two views are possible, one which results in an anomaly and the other not, it is our duty to adopt the latter and not the former, seeking consolation in the thought that the law bristles with anomalies. Anomalies will disappear, and the law will be found to be simple and logical, if it is understood that when a question is raised in an election petition as to the propriety of the rejection of a nomination paper, the point to be decided is about the propriety of the nomination and not the decision of the returning officer on the materials placed before him and that decision must depend on whether the candidate is duly qualified and is not subject to any disqualifications as provided in section 36 (2).

1. (1954) 2 M.L.J. 385 : (1954) S.C.J. 723 : (1955) 1 S.C.R. 267.

It remains to deal with one more contention advanced on behalf of the respondent, and that is based on the following observations in *Hari Vishnu Kamath* v. *Syed Ahmad Ishaque and others*[1] ;

" Under this provision [Rule 47 (4)], the Tribunal is constituted a Court of appeal against the decision of the Returning Officer, and as such its jurisdiction must be co-extensive with that of the Returning Officer and cannot extend further."

The argument is that if the jurisdiction of the Tribunal is co-extensive with that of the returning officer, then the enquiry before it must be confined to the grounds which were urged before the returning officer. Now, the observations quoted above were made statedly with reference to R. 47, and assuming that they apply to an enquiry under section 100 (1) (*c*), the questions till remains, what is the jurisdiction of the returning officer in hearing objections to nomination papers ? His jurisdiction is defined in section 36 (2), and the Tribunal must therefore have jurisdiction to decide all the questions which can be raised under that section. The fact that a particular ground which could have been raised was not, in fact, raised before the returning officer does not put an end to his jurisdiction to decide it, and what he could have decided, if it had been raised, could be decided by the Tribunal, when raised.

Mr. Ganapathy Iyer, learned counsel for the appellant, invited out attention to the decisions of the Election Tribunals on the question whether grounds other than those raised before the returning officer could be put forward in an enquiry in an election petition. They held, with one solitary exception, that it is permissible, and indeed, it is stated in *Mengh Raj* v. *Bhimandas*[2] as settled law that the rejection of a nomination paper can be sustained on grounds not raised before the returning officer. If the legislature which must be taken to have knowledge of the law as interpreted in those decisions wanted to make a departure from it, it would have said so in clear terms, and in the absence of such an expression, it would be right to interpret section 100 (1) (*c*) as not intended to alter the law as laid down in those decisions.

It is now necessary to refer to the decisions which have been cited before us. In *Durga Shankar Mehta's case*[3], the election was to a double-member constituency. The appellant who obtained the largest number of votes was declared elected to the general seat and one Vasantarao, to the reserved seat. The validity of the election was challenged on the ground that Vasantarao was below the age of 25 years, and was, therefore, disqualified to stand. The Election Tribunal upheld that objection, and set aside the entire election. The decision was taken in appeal to this Court, and the point for determination was whether the election of the appellant was liable to be set aside on account of the disqualification of Vasantarao. It was held that the matter fell within section 100 (2) (*c*) as it then stood and not under section 100 (1) (*c*), and that the election of the appellant could not be declared void. This is not a direct pronouncement on the point now in controversy, and that is conceded. In *Vashist Narain Sharma* v. *Dev Chandra and others*[4] a question was raised as to what would be "improper acceptance" within the meaning of section 100; but in the view taken by this Court, no opinion was expressed thereon.

The question now under consideration came up directly for decision before the High Court of Rajasthan in *Tej Singh* v. *Election Tribunal, Jaipur*[5], and it was held that the respondent to an election petition was entitled to raise a plea that the nomination of the petitioner rejected on one ground by the returning officer was defective on one or more of the other grounds mentioned in section 36 (2) of the Act, and that such a plea, if taken, must be enquired into by the Election Tribunal. In *Dhanraj Deshlehara* v. *Viswanath Y. Tamaskar*[6], it was observed by a Bench of the Madhya Pradesh High Court that in determining whether a nomination was improperly rejected, the Election Tribunal was not bound to confine its enquiry to the ground on which the returning officer rejected it, and that even if the ground on which the returning officer rejected the nomination could not be sustained, the rejection could not be

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1. (1955) 1 M.L.J. 157 : (1955) An.W.R. 339 : (1955) S.C.J. 267 : (1955) 1 S.C.R. 1104, 1132 (S.C.).
2. (1952) 2 E.L.R. 301, 310.
3. 1954 S.C.J. 723: (1954) 2 M.L.J. 385 ; (1955) 1 S.C.R. 267.
4. (1954) 2 M.L.J. 379 : (1954) S.C.J. 717 : (1955) 1 S.C.R. 509.
5. (1954) 9 E.L.R. 193.
6. (1958) 15 E.L.R. 260.

held to be improper if the Tribunal found other fatal defects in the nomination. An unreported judgment of the Andhra Pradesh High Court in *Badrivishal Pitti* v. *J. V. Narsing Rao*[1], has been cited before us, and that also takes the view that in an enquiry before the Election Tribunal, it is open to the parties to support an order of rejection of a nomination paper on grounds other than those which were put forward before the returning officer. We are in agreement with these decisions.

As the question has also been raised as to the propriety of interfering in writ petitions under Article 226 with interlocutory orders passed in the course of an enquiry before the Election Tribunal, we shall express our opinion thereon. The jurisdiction of the High Court to issue writs against orders of the Tribunal is undoubted; but then, it is well settled that where there is another remedy provided, the Court may properly exerise its discretion in declining to interfere under Article 226. It should be remembered that under the election law as it stood prior to the amendment in 1956, election petitions were dismissed on preliminary grounds and the correctness of the decision was challenged in application under Article 226 and in further appeals to this Court, with the result that by the time the matter was finally decided, the life of the legislatures for which the election was held would have itself very nearly come to an end, thus rendering the proceedings infructuous. A signal example of a case of this kind is to be found in the decision reported in *Bhikaji Keshao Joshi and another* v. *Brijlal Nandlal Biyani and others*[2]. It is to remedy this defect that the legislature has now amended the law by providing a right of appeal against a decision of the Tribunal to the High Court under section 116-A, and its intention is obviously that proceedings before the Tribunal should go on with expedition and without interruption, and that any error in its decision should be set right in an appeal under that section. In this view, it would be a proper exercise of discretion under Article 226 to decline to interfere with interlocutory orders.

In the result, we allow the appeals, set aside the orders of the Court below, and dismiss the writ petitions filed by the respondent, with costs here and in the Court below.

Appeals allowed ; Writ Petitions dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. J. IMAM, S. K. DAS AND J. L. KAPUR, JJ.

S. PL. Narayanan Chettiar .. *Appellant**

v.

M. AR. Annamalai Chettiar .. *Respondent.*

Madras Agriculturists' Relief Act (IV of 1938) *as amended by Act (XXIII of* 1948), *section* 19 (2) *read with section* 16 (ii) *of the Amending Act—Decree in appeal passed after coming into force of Act (XXIII of* 1948)*—Relief of scaling down not claimed before passing of decree—Subsequent application for scaling down decree—Not barred.*

Section 19 of the Madras Agriculturists Relief Act in express terms entitles the debtor to claim a relief under the provisions of the Act when the Court has passed a decree, after the commencement of the Act, for the repayment of a debt at such commencement. Clause (*ii*) of section 16 of the Amending Act (XXIII of 1948) does not take away that right. To hold that the debtor could ask for relief only when the suit or appeal was pending would be to deny him relief under sections 19 (2), which relief he can claim only after a decree for repayment of the debt has been passed. His failure to claim relief under section 9 does not preclude the debtor claiming relief under section 19 (2) after a decree has been passed.

(1953) 2 M.L.J. 174, reversed.

Appeal by Special Leave from the Judgment and Order dated the 25th March, 1953, of the Madras High Court in Civil Misc. Petition No. 6577 of 1952.†

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1. Since reported in (1959) 1 An. W.R. 31.
2. (1955) 2 M.L.J. 154 : (1955) S.C.J. 658 : (1955) 2 S.C.R. 428 (S.C.).

* Civil Appeal No. 117 of 1955. 31st October, 1958.
† (1953) 2 M.L.J. 174.

R. Ganapathy Iyer, Advocate, for Appellant.

Sardar Bahadur, Advocate, for Respondent.

The Judgment of the Court was delivered by

S. K. Das, J.—In this appeal, pursuant to special leave against the judgment and order of the High Court of Madras, the question for decision is whether the appellant who claims to be an agriculturists debtor is entitled to apply for scaling down of his decretal debt under the provisions of the Madras Agriculturists' Relief Act (IV of 1938), hereinafter called the Act, as amended by the Madras Agriculturists' Relief (Amendment) Act (XXIII of 1948), hereinafter called the amending Act.

The facts which have led to this appeal are that a partnership firm, briefly described as M. AR. Firm, whose partners were Arunachalam Chetty, his two sisters and Subramaniam Chetty, was carrying on the business of money-lending. On the death of Arunachalam Chetty on July 6, 1916, Subramaniam Chetty, one of the surviving partners, took over the assets of the dissolved partnership firm at a valuation of Rs. 25,000 and carried on the business under the name and style of PL. S. Firm of which the partners were Subramaniam Chetty, Vellachi Achi, his two daughters and in 1919 Palaniappa Chetty, father of the appellant, joined the partnership. The amount of Rs. 25,000 was credited in the accounts of the new partnership. On April 19, 1919, the accounts showed a balance of Rs. 16,369-12 as being due to the share of the deceased Arunachalam Chetty which by the year 1935 swelled up to a figure of Rs. 55,933-15. Subramaniam Chetty died in 1924 and the business was carried on after his death by his widow Lakshmi Achi and her daughter and Palaniappa Chetty. In 1930 Palaniappa Chetty died and his sons joined the business in his place. Disputes arose between the partners in 1935 which were referred to arbitration and under an award given on July 31, 1935, Arunachalam Chetty and his sister were directed to pay to the estate of M. AR. Rs. 34,958-11-6 and the defendants, now appellant and his brother, a sum of Rs. 20,975-3 and corresponding entries were made in the account books of PL. S. Firm. In 1944 the plaintiff, now respondent, as the adopted son of Arunachalam Chetty filed a suit for recovery of the amount which the award had directed the defendants to pay. The defendants were the two sons of Palaniappa Chetty. They denied the adoption of the respondent to Arunachalam Chetty and also pleaded the bar of limitation.

The trial Court held the adoption to be invalid and upheld the plea of limitation. The plaintiff took an appeal to the High Court which held the adoption to be valid and also held the suit to be within limitation. It remitted the case to the trial Court for determining certain issues and after the findings were received, the suit was decreed on March 9, 1951, for a sum of Rs. 26,839-15-9. The appellant applied to the High Court for leave to appeal to this Court and also applied for stay. Leave was granted but stay was refused as no security was furnished under the rules, the High Court later revoked the certificate granting leave.

During the pendency of the appeal in the High Court, the Act of 1938 was amended by the amending Act by which new reliefs were given to agriculturist debtors. On October 5, 1951, the appellant made an application to the trial Court for scaling down the decretal debt under section 19(2) of the Act which was added by the amending Act. The trial Court held that the decree could be scaled down under section 19(2) of the Act, but it had no jurisdiction to grant that relief as the decree sought to be scaled down had been passed by the High Court. Against this order the appellant took an appeal to the High Court on July 4, 1952, and also made a separate application in the High Court for scaling down the decretal debt under section 19(2) of the Act. The High Court dismissed the application on March 25, 1953. The appellant then applied for leave to appeal under Article 133 of the Constitution but this was refused on October 6, 1953, and this Court granted special leave on April 19, 1954.

The ground on which the High Court refused relief under section 19(2) of the Act was that " the retrospective operation of section 19(2) was controlled by section 16 of the Act XXIII of 1948" and that clause (ii) of section 16 applied and as the appellant whose appeal was pending at the commencement of the amending Act did not apply for scaling down before the decree was passed although he had the opportunity to do so, his application subsequent to the decree was barred by the principle of *res judicata.* The provisions of section 19(2) of the Act which gave the right to obtain relief of scaling down notwithstanding the provisions of the Code of Civil Procedure to the contrary was held inapplicable, because section 19 (2) of the Act was itself "limited by the provisions of section 16 of Act XXIII of 1948". The High Court observed that although the appellant had filed an additional written statement claiming relief under the Burma Debts Laws, no prayer was made for any relief under the Act. The High Court said :—

" A party who had an opportunity to raise a plea but did not raise the plea is precluded by principles of *res judicata* from raising the plea over again at a subsequent stage. But it is said that the principle of *res judicata* has no application to the present case as section 19 (1) which is incorporated by reference in section 19 (2) says that a petitioner would be entitled to the relief given to him under that section notwithstanding anything stated in the Code of Civil Procedure. But this argument ignores the fact that the scope of section 19 (2) is itself limited by the provisions of section 16 of Act XXIII of 1948 ".

The High Court then referred to the Full Bench judgment in *Sriramreddi* v. *Sriramreddi*[1], where at page 454 it was said :—

" But if the application is not made before the judgment is delivered, it will be too late for a judgment-debtor to raise the question. The final judgment and the decree must be drawn up in accordance therewith ".

But it is unnecessary for us to go into the effect of that judgment in the present case, because it dealt with a different situation and related to proceedings when the Act had not been amended.

The object of the Act as is shown by its preamble was to relieve an agriculturist of the heavy burden of indebtedness in the province (now State) of Madras. With that object in view provisions were made in the Act to scale down certain debts, as defined in the Act, of the agriculturist debtors. See *T. N. Krishna Iyer* v. *Nalla Thambi Mudaliar and others*[2]. The extent of scaling down of the debts and the procedure therefor were laid down in the Act. Section 19 made provision for scaling down of decrees. As the scope of relief under this section was limited to debts and decrees anterior to the commencement of the Act in March, 1938, the objective to be achieved, *i.e.*, of giving relief to the agriculturists debtors remained unrealised and therefore the Legislature again stepped in and passed the amending Act, which commenced on January 25, 1949, the object of which was to give further relief in the case of debts incurred before the commencement of the Act but where the decree was passed after such commencement and, secondly, where both the debt incurred and the decree passed were of a date after the Act. By the amending Act several amendments were made in the Act which were made applicable to suits and proceedings set out in section 16 of the amending Act. One such amendment was the addition of section 19(2) and the amendment of section 19 of the Act which was renumbered as section 19(1). This section which provides for scaling down of decrees, is as follows :—

Section 19 (1). "Where before the commencement of this Act, a Court has passed a decree for the repayment of a debt, it shall on the application of any judgment-debtor who is an agriculturist or in respect of a Hindu joint family debt, on the application of any member of the family whether or not he is the judgment-debtor or on the application of decree-holder, apply the provisions of this Act to such decree and shall notwithstanding anything contained in the Code of Civil Procedure, 1908, amend the decree accordingly or enter satisfaction, as the case may be :

Provided that all payments made or amounts recovered whether before or after the commencement of this Act, in respect of any such decree shall first be applied in payment of all costs as orignally decreed to the creditor ".

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1. I.L.R. (1942) Mad. 346 : (1941) 2 M.L.J. 855 (F.B.).
2. (1955) 1 M.L.J. 215.

(2) " The provisions of sub-section (1) shall also apply to cases where after the commencement of this Act, a Court has passed a decree for the repayment of a debt payable at such commencement ".

Counsel for the appellant has contended that (1) the High Court had erred in its interpretation of section 16(ii) of the amending Act, (2) had not given effect to the beneficial provisions of section 19 (2) of the Act, and (3) had erroneously applied the principles of *res judicata* and thus impaired the efficacy of section 19 which affords relief to an agriculturist debtor notwithstanding the provisions of the Code of Civil Procedure to the contrary. It is necessary to refer at this stage to the amending Act which came into force on January 25, 1949. Section 16 of this Act provides :

Section 16 "The amendments made by this Act shall apply to the following suits and proceedings, namely :—

(i) all suits and proceedings instituted after the commencement of this Act ;

(ii) all suits and proceedings instituted before the commencement of this Act, in which no decree or order has been passed, or in which the decree or order has not become final, before such commencement ;

(iii) all suits and proceedings in which the decree or order passed has not been executed or satisfied in full before the commencement of this Act : Provided that no creditor shall be required to refund any sum which has been paid to or realised by him before the commencement of this Act ".

Unfortunately, the language of section 16 is not very clear and lends itself to difficulties of interpretation. We agree with the High Court that section 16 of the amending Act controls the amendments made by that Act in the sense that those amendments apply to the suits and proceedings described in the three clauses of section 16. Sub-section (2) of section 19 was one of the amendments which was inserted by the amending Act and therefore the appellant debtor must establish that he is entitled to relief under suu-section (2) of section 19, because his case comes under one of the three clauses of section 16. The High Court held that clause (ii) of section 16 applied in the present case ; but the appellant-debtor could and should have raised the plea for relief under the Act when the appeal was pending in the High Court and as he did not do so, he was barred from claiming relief under section 19(2) on the principle of *res judicata.* We do not think that this view is correct and our reasons are the following :

The three clauses of section 16 are independent of each other and clause (1) refers to suits and proceedings instituted after the commencement of the amending Act, the relevant date being January 25, 1949. Clause (i) has no application in the present case and need not be further considered. Clause (iii), it seems clear to us, applies to suits and proceedings in which the decree or order passed had become final, but had not been executed or satisfied in full before January 25, 1949 : this means that though a final decree or order for repayment of the debt had been passed before January 26, 1949, yet an agriculturist debtor can claim relief under the Act provided the decree has not been executed or satisfied in full before the aforesaid date. It should be remembered in this connection that the word 'debt' in the Act has a very comprehsnsive connotation. It means any liability in cash or kind, whether secured or unsecured, due from an agriculturist, whether payable under a decree or order of a civil or revenue Court or otherwise, etc. It is therefore, clear that the word ' debt ' includes a decretal debt. On the view that clause (iii) applies in those cases only where a final decree or order for repayment of the debt had been made before January 25, 1949, it has no application in the present case ; because the decree for repayment of the debt was passed on March 9, 1951, which was after January 25, 1949.

We then go to clause (ii). This clause is in two parts and talks of two different situations ; one is when no decree or order has been passed and the other is when the decree or order passed has not become final. There is, however, a common element, and the common element is that clause (ii) refers to suits and proceedings instituted before January 25, 1949. Now, the argument which learned counsel for the appellant has presented is this. He says that the common element referred to above is satisfied in the present case, because the suit was instituted long

before Jannuary 25, 1949. He then says that no decree or order for repayment of the debt having been passed before March 9, 1951, the first situation envisaged by clause (ii) arose in the present case and the appellant-debtor was entitled to avail himself of all or any of the amendments made by the amending Act, including the amendment made in section 19 by the insertion of sub-section (2) thereof. In the alternative, he says that if the word ' decree or 'order ' means any decree or any order, even then clause (ii) applies, because the decree of dismissal passed in the suit had not become final on January 25, 1949, for an appeal was then pending. We do not think it necessary to consider the alternative argument of learned counsel for the appellant; because we are of the view that having regard to the other provisions of the Act, the words " decree or order " occurring in clause (ii) must mean decree or order for repayment of a debt. What then is the position before us? As we see it, the position is this. Here is a suit which was instituted before the commencement of the amending Act, namely, January 25, 1949. The suit was pending on that date and no decree or order for payment of the debt had been made by that date. The decree for repayment of the debt was made some two years after, on March 9, 1951. Therefore, the two conditions laid down for the first part of clause (ii) are present and it clearly applies to the present case. The High Court recognised this, but thought that the appellant-debtor could ask for relief at only one stage, namely, when the appeal was pending and before a decree had been passed, and if the appellant-debtor did not do so, he was barred from claiming any relief on the principle of *res judicata.* It is here, we think with great respect, that the High Court has gone wrong. The relief under section 19 (2), in terms, is a relief which can be claimed after a decree for repayment of the debt has been passed. It says that the provisions of sub-section (1) shall apply to cases where, after the commencement of the Act, a Court has passed a decree for the repayment of a debt payable at such commencement. The commencement of the Act referred to in section 19(2) is the commencement of the main Act (Mad. IV of 1938). It is not disputed that the debt in the present case was payable at such commencement and the Court had passed a decree for repayment of that debt after such commencement. Section 19 (2) in terms applied, and by reason of the provisions of sub-section (1) of section 19 which were also attracted to the present case, the appellant-debtor was entitled to the relief asked for notwithstanding anything contained in the Code of Civil Procedure, 1908. It is true that the doctrine of *res judicata* is a doctrine of wide import, and section 11 of the Code of Civil Procedure is not exhaustive of it. There is high authority for the view that the principle of *res judicata* may apply apart from the limited provisions of the Code of Civil Procedure, but the question before us, as we see it, is not so much the application of the principle of *res judicata,* as the proper construction of section 19 of the Act and clause (ii) of section 16 of the amending Act. In our opinion, section 19 in express terms entitles the appellant-debtor to claim a relief under the provisions of the Act when the Court has passed a decree, after the commencement of the Act, for the repayment of a debt payable at such commencement.

The question then is—does clause (ii) of section 16 take away that right? We are unable to see how it does. We have already expressed the view earlier that the two conditions for the application of the first part of clause (ii) of section 16 are fulfilled in the present case. If that is so, we fail to appreciate how the appellant-debtor can be barred from claiming relief under section 19 (2) on the principle of *res judicata.* If the statute in express terms gives him a particular right, we do not see how he can be deprived of it. To hold that the appellant could ask for relief only when the appeal was pending would be to deny him relief under section 19 (2), which relief he can claim only after a decree for repayment of the debt has been passed. It is true that he might have claimed relief under other provisions of the Act at the stage when his appeal was pending; for example, he might have claimed relief under section 9. Does that, however, mean that he is precluded from claiming the relief under section 19 (2) after the decree has been passed? We venture to think that the answer must be in the negative. To hold that the appellant-debtor in the present case could ask for a relief only at the pre-decree stage will be tanta-

mount to holding that he is not entitled to relief under section 19 (2), even though section 16 says that all the amendments shall apply to suits and proceedings described in the three clauses thereof. If, as the High Court held, the amendments made by the amending Act could be availed of only when the provisions of secion 16 thereof applied and further that clause (ii) of that section applied to the present suit in its appellate stage, then all the amendments made by the amending Act must apply including the amendment to clause 19. It will be illogical to hold that all the amendments apply save and except sub-section (2). It may *prima facie* appear to be anomalous that it should be available to a party to ask for relief under the Act after the passing of the decree, when he had an opportunity of asking for that relief before the decree was passed, but did not do so. The legislature may not have realised that this would be so; but as the amendments stand, it is clear that in cases covered by clause (ii) of section 16 of the amending Act a party is entitled to ask for relief under the Act at two stages, before a decree for repayment of the debt has been passed and also after such a decree has been passed. Different considerations, will however, arise if a party asks for relief under the Act at the pre-decree stage and that relief is refused on the ground that the Act does not entitle him to any relief under it. If a party, even after such refusal, makes a second application, then the principle laid down in *Narayanan Chettiar* v. *Rathinasami Padayachi*[1], will apply and the second application must fail on the ground that it has already been decided in his presence that he is not entitled to any relief under the Act.

One other point has to be referred to in this connection. On behalf of the respondent-creditor it has been pointed out to us that on the date the application for relief under section 19 (2) was made in the High Court, no suit or proceeding was actually pending, the High Court having passed a decree much earlier, namely, on March 9, 1951. As a matter of fact, the application for relief under section 19 (2) for scaling down the decree was made in the High Court sometime in 1952. We are of the view that clause (ii) of section 16 describes the nature of suits or proceedings in which the amendments shall apply and the pendency of a suit or proceeding on a particular date after January 25, 1949, is not the true test. The true test is whether the suit or proceeding was instituted before January 25, 1949, and whether in that suit or proceeding no decree or order of repayment of a debt had been passed before that date. That test having been fulfilled in the present case, clause (ii) of section 16 of the amending Act did not stand in the way of the appellant when he asked for relief under section 19(2) of the Act.

We now turn to such authorities as have been placed before us. The authorities are not all consistent, and the language of clauses (ii) and (iii) of section 16 of the amending Act has perhaps led to some of the difficulties of interpretation referred to therein. The earliest decision brought to our notice is the decision in *Velagala Sriramareddi and others* v. *Karri Sriramareddi.*[2] This is a Full Bench decision of the Madras High Court to which we have already referred in an earlier part of this judgment. The next decision is that of *Venkataratnam* v. *Seshamma*[3], which is also a Full Bench decision of the Madras High Court. It deals with the construction of clauses (ii) and (iii) of section 16 of the amending Act with particular reference to the view expressed in certain earlier cases of the same High Court with regard to clause (iii) of section 16. The view expressed in the earlier cases, to which the learned Judges who decided the case out of which the present appeal has arisen were parties, was that clause (iii) of section 16 had no application to proceedings in which the decrees and orders had become final before January 25, 1949. The Full Bench did not accept that view as correct. Satyanarayana Rao, J., who delivered the judgment of the Court said :

"It cannot be doubted that the two clauses (ii) and (iii) are entirely independent and are intended to provide for different situations. . . . .

1. A.I.R. 1953 Mad. 721.
2. (1941) 2 M.L.J. 855; I.L.R. (1942) Mad. 346 (F.B.).
3. (1952) 1 M.L.J. 264: I.L.R. (1952) Mad. 492, 498, 499 (F.B.).

"The view taken by the learned Judges in the Civil Miscellaneous Appeals, already referred to, was that, while the two clauses are independent, clause (iii) has no application to proceedings in which the decrees and orders have become final before the commencement of the Act. It is this view which is also pressed now before us by the learned advocate for the respondent. While we agree with the learned Judges in holding that the two clauses are independent, we are unable, wth great respect, to accept the view that clause (iii) applied only to cases in which the decrees and orders have not become final. If the decree or order has not become final before the commencement of this Act, clause (iii), in our opinion, seems to be unnecessary and as such the case would be covered by clause (ii). Further, it would be difficult to imagine that a decree or order which has not become final can be finally executed or can be finally satisfied. No doubt it is true that, even when an appeal is pending, a decree may be executed and satisfaction may be entered. But all that is only subject to the result of the appeal. If the appeal succeeds or the amount due by the defendant to the plaintiff is increased by the appellate Court, fresh execution has to be started, the satisfaction must be re-opened and the execution must proceed. The Legislature, in our opinion, when it enacted these two provisions, must have intended that, even in the case of decrees or orders which have become final, having regard to the provisions of the new Act, relief should be had by the judgment-debtor so long as the decree or order was not executed or was not satisfied in full before the commencement of the Act. If, however, a decree was executed in part and, before it was fully satisfied, the debt was scaled down under the provisions of the Act, as a result of which the creditor was found to have received more than what he was entitled to, the proviso enacts that, in such a situation, the creditor should not be required to refund any sum which has been paid to or realised by him before the commencement of this Act. The question is asked, and legitimately, as to which are the kinds of decrees or orders which have become final and which are sought to be excluded by implication in clause (ii) of section 16. It is of course not easy to give an exhaustive list of such decrees and orders. It may be that the legislature contemplated that decrees and orders of a declaratory nature, and which are not executable and which have become final before the commencement of the Act, need not be re-opened. A reading of the two clauses together would suggest that clause (iii) would apply exclusively to executable decrees or orders which, though they have become final before the commencement of the Act, are still in the stage of unfinished execution and at the stage at which satisfaction was not fully received. The view which we take, in our opinion, reconciles both the clauses and does not make any of the clauses unnecessry."

We concur in the view expressed above that clause (iii) of section 16 applies to decrees or orders which, though they had become finnal before January 25, 1949, are still in the stage of unfinished execution and at the stage at which satisfaction has not been fully received, and clause (ii) applies to suits and proceedings which were instituted before January 25, 1949, but in which no decree or order had been passed or the decree or order passed had not become final before that date. We consider it unnecessary in the present case to go into the further question whether clause (ii) refers to decrees and orders of a declaratory nature, which are not executable but which have become final before January 25, 1949. That is a question which does not fall for decision in the present case and we express no opinion thereon. In *Kanakammal* v. *Muhammad Kathija Beevi*[1], it was observed:

"The mere fact that the judgment-debtor raised an objection to the executability of the whole decree on the ground that it has to be scaled down is no ground for scaling down the decree and the Court will not be justified in so scaling down without a separate application. This is also another ground for holding that the judgment-debtor is not barred from filing the application to scale down the decree even though he had not raised the question at an earlier stage of the execution proceedings. We are therefore definitely of opinion that an application under section 19 of the Act is not one which comes under section 47, Civil Procedure Code, and therefore the principle of *res judicata* in execution cannot apply to the facts of the present case."

The decision in *Narayanan Chettiar* v. *Rathinasami Padayachi*[2], related to a different point altogether, namely, successive applications under section 19 or section 20 of the Act. In that case the question was whether the judgment-debtor not having filed an application under section 19 within the prescribed time from the date of the stay order under section 20 passed on his prior application was precluded from again filing another application under section 20 followed by an application under section 19. It was held that he was not so entitled. In *Jagannatham Chetty* v. *Parthasarathy Iyengar*[3], the question as to the meaning of the word 'proceedings' in section 16 was considered and it was observed that the word 'proceedings' in section 16 must relate to proceedings instituted for repayment of a debt and not to execution proceedings which are for enforcement of a decree or order. We greatly doubt whether that is the

1. I.L.R. (1953) Mad. 152 : (1952) 2 M.L.J. 53 : A.I.R. 1953 Mad. 188, 189.
2. A.I.R. 1953 Mad. 721.
3. A.I.R. 1953 Mad. 777 : (1952) 2 M.L.J. 430.

correct view to take, particularly when the expression 'debt' includes a decretal debt; but as the question does not arise in the present case we refrain from making any final pronouncement. In *Hemavathi* v. *Padmavathi*[1] it was held that the amending Act was retrospective so as even to apply to a debt which had already been scaled down once by the application of the Act and even where the rights of the parties had been finally adjudicated by decree or order of a Court, provided that the decree or order had not been executed or fully satisfied. That was held to be the effect of clause (iii) of section 16 of the amending Act. In *Lingappa Chettiar* v. *Chinnaswami Naidu*[2], the view taken by Subba Rao and Somasundaram, JJ., (the same Judges who decided the present case) in an earlier decision that a party who had an opportunity of getting the beneficent provisions of the Act applied to him before the amendment, but did not avail himself of the same, is disentitled to invoke the provisions of sub-section (2) of section 19 was dissented from and Govinda Menon, J., who gave the judgment of the Court, said :

> "We do not find any difficulty in holding that sub-section (2) of section 19 is applicable to cases like the present, and the retrospective nature of that sub-section as contemplated by clause (iii) of section 16 of Act XXIII of 1948 cannot be restricted or circumscribed by any other clause in that section."

In *T.N. Krishna Iyer* v. *Nallathambi Mudaliar and others*[3], Krishnaswami Nayudu, J., said that the object of section 16 of the amending Act was to render the application of the amendments to a wide range of suits, both to suits instituted before and after the commencement of the amending Act and to such suits in which the decrees have not only become final but have not been executed or satisfied and so long as something remains to be done out of the decree, the Act could be made applicable. It seems to us that both on authority and principle, the correct view is that the appellant was entitled to the benefit of section 19 (2) of the Act, read with section 16, clause (ii) of the amending Act.

These are our reasons for holding that the view taken by the High Court is not correct and the appeal must, therefore, be allowed and the case sent back to the High Court for consideration on merits in accordance with law. The appellant will get his costs of this Court; costs incurred in the High Court before and hereafter will be dealt with by the High Court at the time of the final decision.

There were two applications filed by the appellant-debtor for the relief which he claimed. One was filed in the trial Court and the other in the High Courts The trial Court dismissed the application on the ground that the High Court alone had jurisdiction to give such relief. The appellant preferred an appeal to the High Court and also filed an application there. The question which is the proper Court to give relief to the appellant is a matter on which we are making no pronouncement. That is a matter which will be dealt with by the High Court.

Appeal allowed.

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1. I.L.R. (1954) Mad. 891.
2. (1955) 1 M.L.J. 1, 5.
3. (1955) 1 M.L.J. 215.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, J. L. KAPUR AND M. HIDAYATULLA, JJ.

Rai Bahadur Seth Teomal .. *Appellant**

v.

The Commissioner of Income-tax and the Commissioner of Excess Profits Tax .. *Respondents.*

Income-tax Act (XI of 1922), sections 5, 64 and 66—Scope—Question of place of assessment—Competency of appeal to Appellate Assistant Commissioner and thence before the Appellate Tribunal—Reference under section 66, if lies.

The proceedings for assessment of the appellant, pending before the Income-tax Officer. Rangpur (along with others) were assigned to the Commissioner of Income-tax, Bengal (Central) by the Central Board of Revenue acting under section 5 (2) of the Income-tax Act (XI of 1922) as it involved the Excess Profits Tax liabilities. The Commissioner (Central) assigned the same to the Income-tax Officer, North Calcutta (Income-tax *cum* Excess Profits Tax) who after issuing notices again under sections 22 (4) and 23 (2) of the Act made the assessments to Income-tax on 15th March, 1948 and to Excess Profits Tax on 30th March, 1948.

The Appellate Assistant Commissioner dismissed the appeals against the said orders holding that the objections as to jurisdiction of the assessing officer was without substance as the case was transferred as aforesaid. The Appellate Tribunal also held against the appellant as it was not within their jurisdiction to go into the matter; they further refused to state a case under section 66 (1). The High Court dismissed an application under section 66 (2) to direct the Appellate Tribunal to state such a case.

These appeals are against the order of the Appellate Tribunal; the order of the High Court was not taken in appeal and had become final.

Held :—Section 5 of the Income-tax Act, XI of 1922, although headed 'Income-tax authorities' also gives the Central Board of Revenue and the Commissioners of Income-tax certain powers in regard to withdrawing of cases from one area into other and from one Income-tax Officer to another. Sub-section (2) of this section gives power to the Central Government to appoint as many Commissioners of Income-tax as it thinks fit and they have to perform their functions in respect of different areas, persons and cases or classes thereof as the Central Board of Revenue may direct.

Sub-section (7-A) conferring on the Central Board of Revenue the power to transfer any case from one Officer to the other at any stage of the proceedings is not a provision which in any way modifies or cuts down the powers under section 5 (2). The two sub-sections are complementary and operate in two different spheres.

The argument that sub-section (7-A) is a special provision, which applies in the instant case, and it necessarily excludes section 5 (2) cannot be upheld, the power exercised by the Board cannot be said to be illegal. It was not transferring the case from the Income-tax Officer, Rangpur, to the Income-tax Officer, Calcutta. It directed the Commissioner of Income-tax, Calcutta (Central), to exercise his functions in respect of certain cases including the case of the appellant and that falls under section 5 (2) and not sub-section (7-A).

After an order under section 5 (2) of the Act the provisions of section 64 (1) and (2), which confers jurisdiction on the Income-tax Officer of this area wherein the assessee carries on business or resides, can have no application because of the provisions of section 64 (5) (*a*) of the Act. Hence, in the instant case the order was made by the Central Board of Revenue under section 5 (2) of the Act and so section 64 (5) becomes operative and sub-sections (1) and (2) of section 64 inoperative and the appeal fails on the merits, *Dyaldas Kushiram* v. *Commissioner of Income-tax, Central*, (1939) 8 I.T.R. 139, on longer good law.

The scheme of the Act shows that no appeal in regard to the objection as to place of assessment is contemplated by the Act. Under Proviso (iii) of section 64 (3) of the Act question as to the place of assessment, when it arises is determined by the Commissioner to whom the objection is to be referred by the Income-tax Officer, under the said section 64 (3). Section 30 provides for appeals against the order of assessment and other orders mentioned therein; but no appeal is there provided against the order under section 64 (3). Similarly section 33 providing for appeal to the Tribunal do not provide any appeal on the question of place of assessment.

In the above view, the question as to place of assessment does not arise out of the order of the Income-tax Appellate Tribunal and therefore no question of law could be referred nor could the High Court make an order under section 66 (2).

Quaere :—Whether an appeal lies against the order of the Appellate Tribunal refusing to state a case under section 66 (1) where the order of the High Court dismissingan application under section 66 (2) is not appealed from and has become final ? (not decided as the matter fails on the merits itself).

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*Civil Appeals Nos. 384 and 385 of 1957. 2nd March, 1959.

Appeal by Special Leave from the Order, dated the 28th November, 1952, of the Income-tax Appellate Tribunal (Calcutta Bench) in I.T.A. No. 4067 and E.P.T. Appeal No. 391 of 1951-52.

N. C. Chatterjee, Senior Advocate (*B. Sen Gupta* and *B. P. Maheshwari*, Advocates with him), for Appellant.

K. N. Rajagopala Sastri, *R. H. Dhebar* and *D. Gupta*, Advocates, for Respondents.

The Judgment of the Court was delivered by

Kapur, J.—These two appeals pursuant to Special Leave are brought against two orders of the Income-tax Appellate Tribunal (Calcutta Bench), dated November 28, 1952, passed in Appeal No. I. T. A. 4067 of 1951-52 in respect of income-tax assessment for the assessment year ending 31st March, 1944 and in Appeal No. E.P. T.A. 391 of 1951-52 in respect of Excess Profits-tax assessment of the appellant for the chargeable accounting period ending March 31, 1943. The original assessee was R. B. Seth Teomal who was the manager of a Hindu undivided family. On Seth Teomal's death on May 30, 1944, Seth Ottanmal became the manager. He is now the appellant representing the Hindu undivided family. He will be termed as the appellant in these appeals. Seth Teomal was carrying on the business of a railway contractor at Lalmonirhat in the district of Rangpur which is now in Pakistan. In April, 1943, a notice was served on him under section 22 (2) of the Income-tax Act (hereinafter called the Act). He filed the return on February 28, 1944. The Income-tax Officer, Rangpur, served notices on him under sections 24 (4) and 23 (2) for production of books, etc. It appears that assessment proceedings continued before the Income-tax Officer, Rangpur, but no final assessment was made.

According to an affidavit which has now been filed in this Court the Central Board of Revenue by an order passed under sub-section (2) of section 5 of the Act assigned the appellant's case along with some other assessment cases to the Commissioner of Income-tax (Central), Calcutta. The order contains the following endorsements which give an indication of the reason for the case being assigned to the Commissioner of Income-tax (Central) :

"Copy forwarded to :—

(1) ....

(2) Commissioner of Income-tax, Central Calcutta. These cases are reported to have Excess Profits Tax liabilities".

Thus the appellant's case which was before an Income-tax Officer within the area in charge of the Commissioner of Income-tax, Bengal (Mofussil) was withdrawn from him and was assigned to the Commissioner of Income-tax, (Central), Calcutta. On February 11, 1948, the Income-tax Officer, District North Calcutta, (Income-tax *cum* Excess Profits Tax) to whom it appears the appellant's assessment case was assigned issued notice again under sections 22 (4) and 23 (2) of the Act. That officer after making the usual enquiries made the assessment order on March 15, 1948. The order for Excess Profits Tax assessment was made on March 30, 1948.

Against these orders two appeals were taken to the Appellate Assistant Commissioner on April 30, 1948. In the appeal against income-tax assessment the appellant *inter alia* raised the following two grounds in regard to the jurisdiction of the Income-tax Officer, Calcutta :

"5. For that the petitioner is not aware of any order passed for the transfer of the case from Rangpur to Calcutta and it is submitted that without such an order and communication of such order the assessment is challengeable for want of jurisdiction."

"32. For that the appellants challenge the jurisdiction as there was no proper order of transfer and the business was carried on outside Calcutta and assessments had never before been made in Calcutta."

But no such ground was taken in the appeal against Excess Profits Tax assessment. The Appellate Assistant Commissioner dismissed both these appeals. In regard to jurisdiction he held :

"It however appears from records on hand that the principal place of business of the concern was at Rangpur and as the income attracted Excess Profits Tax liability the case was transferred to Calcutta under Orders of Central Board of Revenue. Hence there is no substance in the contention of the learned advocate which fails".

The appellant then took two appeals to the Income-tax Appellate Tribunal. In the appeal against income-tax assessment he took two objections in regard to jurisdiction :

"For that the objection taken before the learned Appellate Assistant Commissioner on jurisdiction should not have been summarily disposed of by passing reference to an order of transfer of the case from Rangpur to Calcutta without at the same time discussing when the question of jurisdiction was seriously raised and how and under what circumstances and to whom was the case transferred and for what purpose".

"2. For that the appellant begs leave to repeat that transfer was not legal or proper and was not made by any proper authority to legalise such transfer."

In the Excess Profits Tax appeal also this time an objection was taken as to jurisdiction :

"For that the assessment is bad in law having been made without jurisdiction."

The Appellate Tribunal held against the appellant in a short paragraph :

"So far as the first objection is concerned, in our opinion, it is not within our jurisdiction to go into this matter. The objection relates to the place of assessment. As held in (1945) I.T.R. 39 (*Wallace Brothers & Co., Ltd.* v. *Commissioner of Income-tax, Bombay, Sind and Baluchistan, Federal Court*) the question as to the proper place of assessment is not one for adjudication by a Court or by any Appellate Authority. Consequently we overrule the first contention of the Assessee".

The Tribunal thus held that as the objection related to the place of assessment the Tribunal was not competent to go into that question. Upon this the appellant applied for a reference to be made under section 66 (1) of the Act and prayed for five questions to be referred. The two questions relating to jurisdiction were :—

(1) "Had the Income-tax Officer (Non-Companies Income-tax *cum* Excess Profits Tax District Calcutta) jurisdiction to make the assessment ?

(2) Was the Income-tax Appellate Tribunal correct in the circumstances in holding that it has no jurisdiction to determine the competence of the Income-tax Officer in making the assessment?"

In the "facts of the case" attached to the grounds of Appeal it was stated that the accounts were produced before the Income-tax Officer, Calcutta, under protest because the jurisdiction of that officer was being challenged. In reply to this the Commissioner after referring to *Wallace Brothers' case*[1], stated that it did not appear from the assessment record that the assessee ever raised any objection to the jurisdiction of the Income-tax Officer and if it had been taken the matter would have been referred by the Income-tax Officer to the Commissioner as required by law. This application under section 66 (1) was dismissed on the ground that the question of jurisdiction could not arise out of the order of the Tribunal and reliance was placed on *Wallace Brothers' case*[1] and *Seth Kanhaiyalal* v. *Commissioner of Income-tax*[2]. The appellant applied to the High Court under section 66 (2) of the Act and prayed for the following two questions and some others to be referred :—

(i) "Had the Income-tax Officer (Non-Companiets Income-tax *cum* Excess Profits Tax District Calcutta) jurisdiction to make the assessment ?

(ii) Was the Income-tax Appellate Tribunal correct in the circumstances in holding that it had no jurisdiction to determine the competence of the Income-tax Officer in making the assessment ?"

The High Court dismissed this application on July 23, 1954. No appeal has been filed in this Court against the order of the High Court but an appeal has been filed against the order passed by the Income-tax Appellate Tribunal.

On behalf of the Revenue a preliminary objection was taken that as no appeal had been filed against the order of the High Court that order had become final and this Court, therefore, should not entertain the appeal against the order of the Tribunal and reliance was placed on the observations of Venkatarama Aiyar, J., in *Govinda Rajulu Mudaliar* v. *Commissioner of Income-tax*[3]. At page 810 it was observed:—

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1. (1945) F.L.J. 34 : (1945) 1 M.L.J. 359 : (1945) F.C.R. 65.
2. (1936) 5 I.T.R. 739.
3. (1958) 34 I.T.R. 807 (810).

"The present appeal is against the decision of the Tribunal itself. It is no doubt true that this Court has decided in *Dhakeswari Cotton Mills, Ltd.* v. *Commissioner of Income-tax, West Bengal*[1], that an appeal lies under Article 136 of the Constitution of India to this Court against a decision of the Appellate Tribunal undert he Indian Income-tax Act. But seeing that in this case the appellant had moved the High Court and a decision has been pronounced adverse to him and this has become final obviously it would not be open to him to question the correctness of the decision of the Tribunal on grounds which might have been taken in an appeal against the judgment of the High Court. All the points urged before us were taken in the reference under section 66 (2) of the Indian Income-tax Act. It would therefore follow that these grounds are not open to the appellant".

But counsel for the appellant relied on *Dhakeswari Cotton Mills, Ltd.* v. *Commissioner of Income-tax*[1], where the scope of appeals under Article 136 were set out by the learned Chief Justice. In this case however it is not necessary to go into this question because in our opinion there is little substance in the appeal itself.

Counsel for the appellant has urged two grounds in support of his appeal: that this place of business was Lalmonirhat and under section 64 (1) and (2) of the Act he was entitled to be assessed by the Income-tax Officer of that area and (2) that assessment by the Income-tax Officer of Calcutta was an illegal assumption of jurisdiction and therefore he was entitled to have the order of assessment quashed. In order to decide these questions reference has to be made to the scheme of the Act. The provisions relevant to the issue of jurisdiction are sections 5 and 64. The former is headed "Income-tax authorities" and the latter "Place of assessment." Assessment is made by the Income-tax Officer under section 23 (3). Against an order of assessment or the liability to be assessed an appeal lies under section 30 to the Appellate Assistant Commissioner and a further appeal to Income-tax Appellate Tribunal under section 33 of the Act. And then a reference can be made by the Tribunal to the High Court under section 66 (1) of the Act and if the Tribunal does not make such reference the High Court can under section 66 (2) be moved and it can then direct that such reference be made.

The heading of section 64 is " Place of assessment". Sub-section (1) of section 64 provides that the assessee shall be assessed by the Income-tax Officer of the area in which he carries on his business. Sub-section (2) lays down that in all other cases an assessee shall be assessed by the Income-tax Officer of the area in which he resides. Under these two sub-sections therefore the appellant, because he was carrying on business at Lalmonirhat, had to be assessed by the Income-tax Officer of that area, *i.e.*, by the Income-tax Officer of Rangpur. Sub-section (3) of that section provides that if a question as to the place of assessment arises, it is to be determined by the Commissioner of Income-tax or by Central Board of Revenue according as the case may be. Under the first proviso to this sub-section before the question as to the place of assessment is determined the assessee has to have an opportunity of representing his views and under the second proviso the place of assessment cannot be called into question by the assessee if he has made a return in response to the notice under sub-section (1) of section 22 and has stated therein the principal place where he carries on his business or if he has not made such a return, the time specified in the notice has expired. The third proviso to this sub-section is:

"Provided further that if the place of assessment is called in question by an assessee the Income-tax Officer, shall, if not satisfied with the correctness of the claim, refer the matter for determination under this sub-section before the assessment is made".

Thus under section 64 (3) the question of determination as to the place of assessment only arises if an objection is taken by the assessee and the Income-tax Officer has any doubts as to the matter. But the determination is to be by the Commissioner of Income-tax or the Central Board of Revenue. The Act does not contemplate any other authority.

It was contended on behalf of the assessee that he produced his accounts before the Income-tax Officer at Calcutta under protest. There is no mention of this protest in the assessment file and that is what was stated by the Commissioner of Income-tax in his reply which he gave on March 3, 1953, before the Income-tax

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1. (1955) S.C.J. 68; (1955) 1.M.L.J. (S.C.) 60: (1955) 1 S.C.R. 941, 949.

Appellate Tribunal and which has been set out above. If such an objection has been raised the question would have been referred by the Income-tax Officer to the Commissioner as required under section 64 (3). That stage never arose because the objection does not seem to have been taken at the stage when it should have been taken *i.e.*, before the Income-tax Officer, Calcutta.

But it is contended by counsel for the appellant that in the present case there is an illegal assumption of jurisdiction as the officer who made the assessment had no jurisdiction at all to make the assessment. It was also contended that if the Central Board of Revenue wanted to transfer the assessment proceeding from the Income-tax Officer, Rangpur, to the Income-tax Officer at Calcutta, it could only exercise that jurisdiction by making an order under section 5 (7-A) and not under section 5 (2) of the Act. He relied on *Taylor* v. *Taylor*[1], where it was held that if a mode of exercise of power is laid down in the statute it has to be exercised in that way and no other. He also relied on *Nazir Ahmed* v. *The King Emperor*[2]. He further contended that this was not a case which fell under section 5 (2) of the Act. Section 5 (7-A) gives to the Central Board of Revenue the power to transfer any case from one Income-tax Officer to another which can be made at any stage of the proceedings and does not necessitate the reissuing of a notice under section 22 (2) if it had already been issued by the Income-tax Officer from whom the case is transferred and in the *Explanation* the word 'case' in relation to any person whose name is specified in the order of transfer means all proceedings under the Act which may be pending on the date of the transfer and includes all proceedings which may be commenced after the date of the transfer.

Section 5 although headed 'Income-tax authorities' also gives to the Central Board of Revenue and the Commissioners of Income-tax certain powers in regard to withdrawing of cases from one area into another and from one Income-tax Officer to another. Sub-section (2) of this section gives power to the Central Government to appoint as many Commissioners of Income-tax as it thinks fit and they have to perform their functions in respect of different areas, persons and cases or classes thereof. The relevant portion of the sub-section is as follows :—

"*Section* 5 (2).—The Central Government may appoint as many Commissioners of Income-tax as it thinks fit and they shall perform their functions in respect of such areas or of such persons or classes of persons or of such incomes or classes of incomes or of such cases or classes of cases as the Central Board of Revenue may direct. . . . ."

In the present case there are more than one Commissioner of Income-tax in Bengal and the Central Board of Revenue assigned certain cases including the case of the appellant to the Commissioner of Income-tax (Central) at Calcutta for the exercise of his functions as Commissioner. Now this is a power which the Central Board of Revenue did possess under sub-section (2) of section 5. As to which Income-tax Officer was to deal with that case was for the Commissioner of Income-tax to designate.

Sub-section (7-A) of section 5 confers on the Central Board of Revenue the power to transfer any case from one Income-tax Officer to the other which can be done at any stage of the proceedings. This sub-section is not a provision which in any way modifies or cuts down the power given to the Central Board of Revenue under section 5 (2). The two sub-sections are complementary and operate in two separate spheres. Sub-section (2) is for the purpose of specifying as to which of the Commissioners would perform functions in respect of different areas, persons, incomes or cases or classes thereof.

It was argued that sub-section (7-A) is a special provision and it necessarily excludes the operation of sub-section (2) but as we have said above the two sections are not mutually exclusive. They operate in two different spheres, their areas of operation are different and therefore the power which the Central Board of Revenue exercised in the present case cannot be said to be illegal. It was not transferring

1. L.R. (1875) 1 Ch.D. 426, 431.
2. (1936) I.L.R. 17 Lah. 629 : 71 M.L.J. 476 : L.R. 63 I.A. 372.

the appellant's case from the Income-tax Officer, Rangpur, to the Income-tax Officer, Calcutta. It directed the Commissioner of Income-tax Calcutta (Central) to exercise his functions is respect of certain cases including the case of the appellant and that falls under section 5 (2) and not under section 5 (7-A).

Reference was made to *Pannalal Binjraj* v. *Union of India*[1]. But that was a case in which the question raised was of constitutional validity of sub-section (7-A) of section 5 and it was held that it was a measure of administrative convenience and was valid and neither infringed the fundamental rights under Article 14 nor under Article 19 (1) (*g*). There are no observations in that case which militate against the view that sub-sections (2) and (7-A) operate in different areas nor did that question arise in that case. The contention there raised was that sub-section (7-A) conferred arbitrary and uncontrolled powers of transfer and was discriminatory and violative of the provisions of Article 14 and imposed an unreasonable restriction on the right to carry on trade or business in contravention of Article 19 (1) (*g*). Counsel referred to *Bidi Supply Co.* v. *Union of India*[2]. But that case also does not deal with the matter now before us. The simple questions to be a decided is whether the Income-tax Officer, Calcutta, could not make the assessment in the appellant's case. The submission that there was illegal assumption of jurisdiction by the Income-tax Officer of Calcutta is not well founded. If the Central Board of Revenue had the power to direct the Commissioner of Income-tax (Central) Calcutta to exercise his function in respect of several cases including the appellant's mentioned in the order, dated November 29, 1946, as indeed it had under section 5 (2) then neither that order could be challenged nor the power of the Income-tax Officer, Calcutta, to make the assessment. After an order by the Central Board of Revenue under section 5 (2) of the Act the provisions of sub-section (1) and 2 of section 64 have no application because of sub-section (5-*q*) of section 64 which is as follows :

" *Sub-section* (5).—The provisions of sub-section (1) and sub-section (2) shall not apply and shall be deemed never at any time to have applied to any assessee—

(*a*) on whom an assessment or reassessment for purposes of this Act has been, is being or is to be made in the course of any case in respect of which a Commissioner of Income-tax appointed without reference to area under sub-section (2) of section 5 is exercising the functions of a Commissioner of Income-tax ".

In view of this provision, *i.e.*, section 5 (2), no objection can be taken on the ground of sub-sections (1) and (2) of section 64.

Counsel for the appellant relied on a judgment of the Bombay High Court in *Dyaldas Kushiram* v. *Commissioner of Income-tax (Central)*[3], where it was held that section 64 was intended to ensure that as far as practicable the assessee should be assessed locally, *i.e.*, by the Income-tax Officer of the area in which the assessee carries on business and there must, so far as the exigencies of the case allow, be some reasonable relation to the place where the assessee carries on business or resides. In that case the assessee was carrying on business in C Ward and the proper officer under section 64 to assess him was the Income-tax Officer of that Ward. As a result of the coming into force of section 5 (2) the Commissioner of Income-tax (Central) was created without reference to the area. The case of the assessee on whom the notice had been served but had not been assessed in due course assigned to the Commissioner of Income-tax (Central) who designated an Income-tax Officer for assessment of the assessee. The assessee thereupon made an application under section 45 of the Specific Relief Act and prayed for direction to the Commissioner of Income-tax (Central) and the Income-tax Officer to whom his case had been assigned to forbear from continuing the proceedings on the grounds that the Income-tax Officer had no jurisdiction having regard to section 64 of the Act. It was held that the Income-tax Officer was not the Income-tax Officer of the area in which the assessee was carrying on business. It was also held that in spite of the insertion of section 5 (2) of the Act such assessment was without jurisdiction because there was no

1. (1957) S.C.R. 233, 266.
2. (1956) S.C.J. 492 : (1956) S.C.R. 267.
3. (1939) 8 I.T.R. 139.

amendment of section 64. As a result of this judgment Ordinance IX of 1939 was promulgated which subsequently was enacted as sub-section 5 of section 64. After the Ordinance the assessee Dyaldas Kushiram was assessed by the same Officer and after unsuccessful appeals to the Commissioner of Income-tax and the Appellate Tribunal he made an application under section 66 (1) on three questions :

"(1) Whether the order passed by the Commissioner of Income-tax deciding the place of assessment of the assessee could be the subject-matter of appeal to the Income-tax Appellate Tribunal : (2) Whether the Tribunal had the power to entertain an appeal on the question as to the place of assessment of an assessee even in the absence of the order of Commissioner of Income-tax and (3) whether the question as to the place of assessment is a question of law arising out of the order of the Appellate Tribunal."

It was held that the order of the Commissioner was made under section 5 (2) not under section 64 (3) and as the Ordinance had retrospective effect these questions did not arise and that the assessment of the assessee was validly made by the Income-tax Officer and the Ordinance removed the invalidity of the orders made prior to the passing of the Ordinance so far as they related to the assessee. Beaumont, C.J., held that the Income-tax Act did not determine the place of assessment but the officer who had to assess and that there could be no appeal under the Act against the order of the Commissioner as to the place of assessment, but only against the order of assessment of the Income-tax Officer.

Counsel for the appellant also relied on the judgment of the Allahabad High Court in *Dina Nath Hem Raj* v. *Commissioner of Income-tax*[1]. In that case the assessee was carrying on business at Calcutta and he was sought to be assessed at Kanpur and an objection was taken to the Income-tax Officer, Kanpur, making the assessment. The Income-tax Officer did not proceed in accordance with section 64 (3) and therefore it was held that assessment made by him was without jurisdiction. In the present case no question has been raised as to the jurisdiction of the Income-tax Officer who made the assessment and apart from that the order was by the Central Board of Revenue under section 5 (2) of the Act and section 64 (5) becomes operative and sub-sections (1) and (2) of section 64 are inoperative. See also *Seth Kanhaiyalal* v. *Commissioner of Income-tax*[2].

The question then arises whether the objection as to the place of assessment, *i.e.*, by the Income-tax Officer of Calcutta could be challenged in appeal to the Appellate Assistant Commissioner and then before the Appellate Tribunal. In our opinion it could not be. The scheme of the Act shows that no appeal in regard to the objection to the place of assessment is contemplated under the Act. Under Proviso (iii) of section 64 (3) of the Act a question as to the place of assessment, when it arises, is determined by the Commissioner. Any such order cannot be made a ground of appeal to the Appellate Assistant Commissioner under section 30 of the Act which provides for appeal against orders of assessment and other orders enumerated in section 30 but no appeal is there provided against orders made under section 64 (3). Similarly appeals to the Appellate Tribunal whieh lie under section 33 of the Act also do not provide for any appeal on the question of the place of assessment. In *Wallace Brothers case*[3], at page 79, Spens, C.J., after referring to section 64 (3) and the Proviso thereto said :

"These provisions clearly indicate that the matter is more one of administrative convenience than of jurisdiction and in any event it is not one for adjudication by the Court. . . . . This confirms us in the view that the scheme of the Act does not contemplate an objection as to the place of assessment being raised on an appeal against the assessment after the assessment has been made. As we have already pointed out, the objection was not raised in the present case even before the Appellate Income-tax Officer but only before the Appellate Tribunal".

There is nothing in the *Bidi Supply case*[4], which in any way detracts from the efficacy of the decision of the Federal Court in *Wallace Brothers case*[3]. We have already said that *Bidi Supply case*[4] deals with the vires of section 5 (7-A).

1. (1927) I.L.R. 49 All. 616.
2. (1936) 5 I.T.R. 739.
3. 1945 F.L.J. 34 : (1945) 1 M.L.J. 359 : 1945 F.C.R. 65.
4. 1956 S.C.J. 492 : 1956 S.C.R. 267.

In this view of the matter the question as to the place of assessment does not arise out of the order of the Income-tax Appellate Tribunal and therefore no question of law could be referred nor could the High Court make such order under section 66 (2). In our opinion the High Court rightly dismissed the appellant's application for directing the case to be stated under section 66 (2) of the Act.

The appeals, therefore, fail and are dismissed with costs.

In the circumstances of the case there will be only one set of costs.

Appeals dismissed.

SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—S. R. DAS, *Chief Justice*, N. H. BHAGWATI, B. P. SINHA, K. SUBBA RAO AND K. N. WANCHOO, JJ.

Kavalappara Kottarathil Kochunni *alias* Moopil Nayar and others.. *Petitioners**

v.

The State of Madras and others .. *Respondents.*

K. C. Gopalan Unni and others .. *Interveners.*

Constitution of India (1950), *Article* 32—*Scope—Maintainability of petition under—Existence of adequate legal remedy—Jurisdiction and powers of the Supreme Court under—Impugned statute merely declaratory—Action not taken nor threatened to be taken thereunder—Infringement of Fundamental Rights by the effect of the Statute—Madras Marumakkathayam (Removal of Doubts) Act (XXXII of* 1955).

The Madras Legislature passed the Madras Marumakkathayam (Removal of Doubts) Act (XXXII of 1955) which was assented to by the President and published in the Official Gazette of October 19, 1955. Section 2 of the Act declared certain kinds of 'Sthanam' properties to be 'Tarwad' properties.

Immediately after, respondents 2 to 17 published notices in 'Mathrubhumi' a Malayalam daily that by virtue of the said Act the Kavalappara Estate has become their Tarwad properties and rent can be paid to the (petitioner) Sthanee only as the karnavan of the tarwad and his donees (the other petitioners) had no right to the properties gifted to them and no rent could be paid to them.

Thereupon the three petitions (by the Sthanee, and his two donees) were filed under Article 32 of the Constitution (1950) praying that a writ of *mandamus* or any other proper writ, order of direction be ordered to issue for the purpose of enforcing their fundamental rights, directing the respondents to forbear from enforcing any of the provisions of said Act XXXII of 1955 against him, his Kavalappara Sthanam and Kavalappara Estate declaring the said Act to be unconsitutional and void.

A preliminary objection was taken that the petitions are not maintainable for the following reasons.

(i) the petitioners could urge their contentions in the defence and get relief in the pauper suit filed by one of the respondents.

(ii) the violation of the rights to the property by private individuals is not within the purview of the Article (19) (1) (*f*) or Article 31 (1) and the proper remedy is by the ordinary law and not by a petition under Article 32.

(iii) an application under Article 32 cannot be maintained until the State has taken or threatened to take any action under the impugned law.

(iv) the impugned Act being only a piece of declaratory legislation not contemplating or requiring any action to be taken by the State the proper remedy is by a regular suit; in other words the proceeding under Article 32 cannot be converted into or equated with declaratory suits under section 42 of the Specific Relief Act, and

(v) the Court cannot embark on disputed questions of fact in an application under Article 32.

Held : The right to move the Supreme Court under Article 32 of the Constituion of India (1950), for the enforcement of the Fundamental Rights in Part III of the said Constitution is itself a guaranteed right.

The mere existence of an adequate alternative legal remedy is not a good and sufficient ground to throw out a petition under the said Article 32, if the existence of a fundamental right and a breach, actual or threatened of such right, is alleged and *prima facie* established on the petition.

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* Petitions Nos. 443 of 1955 and 40-41 of 1956. 4th March, 1959.

The gravamen of the complaint of the petitioners is directly against the impugned Act (XXXII of 1955) passed by the Madras Legislature, which is within the expression 'State' as defined in Article 12 of the Constitution and the petitions are primarily against the action of the said 'State' and the respondents 2 to 17 are impleaded because they are interested in denying the petitioner's rights. It is the common case of the petitioners and the respondents that the impugned Act does affect the right of the petitioners to hold and enjoy the properties as 'sthanam' properties; the petitioners contend that the law is void and the respondents maintain the opposite view. There is no reason why, in such circumstances, the petitioners should be debarred from availing themselves of their constitutional right to invoke the jurisdiction of this Court for obtaining redress against infringement of their fundamental rights.

Quite conceivably an enactment may immediately on its coming into force take away of abridge the fundamental rights of a person by its very terms without any further overt act being done. In such a case the infringement of the fundamental right is complete *eo instanti* the passing or the enactment and therefore there can be no reason why the person so prejudicially affected by the law should not be entitled to avail himself of the constitutional remedy under Article 32. To hold otherwise will be to deny the benefit of a statutory constitutional remedy which is itself a fundamental right.

P. D. Shamdasani v. *Central Bank of India, Ltd.*, (1952) S.C.J. 29 : (1952) 1 M.L.J. 423 : 1952 S.C.R. 391, distinguished.

Though in physical possession of the 'sthanam' properties, the petitioners no longer possesses the right of the 'sthanee' and they cannot as the 'sthanee' or his assigns, lawfully claim any rent from the tenants. In view of the language employed in section 2 of the Madras Act XXXII of 1955 and its effect the petitioners can legitimately complain that their fundamental right to hold and dispose of the 'sthanam' properties has been infringed by the action of the Madras Legislature (State). In the premises the petitioners are *prima facie* entitled to apply under Article 32.

It appears to be well-established that the powers of this Court (the Supreme Court) under Article 32 are wide enough to make even a declaratory Order where that is the proper relief to be given to the aggrieved party. If the impugned Act has taken away or abridged the petitioners' right under Article 19 (1) (*f*) by its own terms without anything more and the infraction cannot be justified—as to the correctness of such contention nothing is said now—this is precisely an appropriate case for such an order. A declaration as to the invalidity of the impugned Act together with the consequential relief by way injunction restraining the respondents from asserting any rights under the enactment so declared void will be the only appropriate relief the petitioners will be entitled to get.

The Supreme Court will not decline to entertain a petition under Article 32 on the simple ground that it involves the determination of disputed questions of fact. It is very often possible to decide questions of fact on affidavits.

Per *Wanchoo, J.*—Though it seems doubtful whether an application under Article 32 challenging a general law of the kind (declaratory), however, the judgment of Das, C.J., is not dissented from and I concur with the proposed order.

Petitions under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

M. C. Setalvad, Attorney-General for India and *M. K. Nambiyar*, Senior Advocate (*J. B. Dadachanji, S. N. Andley* and *Rameshwar Nath*, Advocates of *Rajinder Narain and Co.*, with him) for Petitioners.

T. M. Sen Advocate, for the State of Madras.

K. V. Suryanarayana Iyer, Advocate-General for the State of Kerala (*T. M. Sen*, Advocate, with him), for the State of Kerala.

M. R. Krishna Pillai, Advocate, for Respondents Nos. 2-9.

Purshottam Tricumdas, Senior Advocate, (*M. R. Krishna Pillai*, Advocate, with him), for Respondent 12 in Petitions Nos. 40 and 41 of 1956.

K. R. Krishnaswami, Advocate, for Respondents No. 11, 13-17 in Petition 443 of 1955.

Purshottam Tricumdas, Senior Advocate, (*K. R. Krishnaswami*, Advocate with him), for Respondent No. 12 in No. 443 of 1955.

A. V. Viswanatha Sastri, Senior Advocate (*M. R. Krishna Pillai*, Advocate, with him), for Intervener No. 1.

Sardar Bahadur, Advocate, for Intervener No. 2.

M R. Krishna Pillai, Advocate, for Intervener No. 3.

The Judgment of the Court was delivered by

Das, C.J.—The circumstances leading up to the presentation of the above noted three petitions under Article 32, which have been heard together, may be shortly stated :

In pre-British times the Kavalappara Moopil Nair, who was the seniormost male member of Kavlappara Swaroopam of dynastic family, was the ruler of the Kavalappara territory situate in Walluvanad Taluk in the district of South Malabar. He was an independent prince or chieftain having sovereign rights over his territory and as such was the holder of the Kavalappara sthanam, that is to say, " the status and the attendant property of the senior Raja". Apart from the Kavalappara sthanam, which was a Rajasthanam, the Kavalappara Moopil Nair held five other sthanams in the same district granted to his ancestors by the superior overlord, the Raja of Palghat, as reward for military services rendered to the latter. He also held two other sthanams in Cochin granted to his ancestors by another overlord, the Raja of Cochin, for military services. Each of these sthanams has also properties attached to it and such properties belong to the Kavalappara Moopil Nair who is the sthanee thereof. On the death in 1925 of his immediate predecessor the petitioner in Petition No. 443 of 1955 became the Moopil Nair of Kavalappara and as such the holder of the Kavalappara sthanam to which is attached the Kavalappara estate and also the holder of the various other sthanama in Malabar and Cochin held by the Kavalappara Moopil Nair. The petitioner in Petition No. 443 of 1955 will hereafter be referred to as " the sthanee petitioner ". According to him all the properties attached to all the sthanams belong to him and respondents 2 to 17, who are the junior members of the Kavalappara family or tarwad, have no interest in them.

The Madras Marumakkathayam Act (XXII of 1932) passed by the Madras Legislature came into force on August 1, 1933. This Act applied to tarwads and not to sthanams and section 42 of the Act gave to the members of a Malabar tarwad a right to enforce partition of tarwad properties or to have them registered as impartible. In March, 1934, respondents 10 to 17, then constituting the entire Kavalappara tarwad, applied under section 42 of the said Act for registration of their family as an impartible tarwad. In spite of the objection raised by the sthanee petitioner, the Sub-Collector ordered the registration of the Kavalappara tarwad as impartible. The sthanee petitioner applied to the High Court of Madras for the issue of a writ to quash the order of the Sub-Collector, but the High Court delcined to do so on the ground that the sthanee petitioner had no real grievance as the said order did not specify any particular property as impartible property. While this decision served the purpose of the sthanee petitioner, it completely frustrated the object of respondents 10 to 17. On April 10, 1934, therefore, respondents 10 to 17 filed O. S. No. 46 of 1934 in the Court of the Subordinate Judge of Ottapalam for a declaration that all the properties under the management of the defendant (meaning the sthanee petitioner) were tarwad properties belonging equally and jointly to the plaintiffs (meaning the respondents 10 to 17 herein) and the defendant, *i.e.*, the sthanee petitioner, and that the latter was in management thereto only as the Karnavan and manager of the tarwad. The sthanee petitioner contested the suit asserting that he was the Kavalappara Moopil Nair and as such a sthanee and that the properties belonged to him exclusively and that the plaintiffs (the respondents 10 to 17 herein) had no interest in the suit properties. By his judgment pronounced on February 26, 1939, the Subordinate Judge dismissed the O.S. No. 46 of 1934. The plaintiffs (the respondents 10 to 17 herein) went up in appeal to the Madras High Court, which, on April 9, 1943, allowed the appeal and reversed the decision of the Subordinate Judge and decreed the suit. That judgment will be found reported in *Kuttan Unni* v. *Kochunni*[1]. The defendant, *i.e.*, the sthanee petitioner herein carried the matter to the Privy Council and the Privy Council by its judgment, pronounced on July 29, 1947,[2] reversed the judgment of the High Court and restored the decree of dismissal

1. (1944) 1 M.L.J. 272 : I.L.R. (1944) Mad. 515.

2. *Kochunni* v. *Kuttan Unni*, (1948) 1 M.L.J. 181: I.L.R. (1948) Mad. 672 (P.C.).

of the suit passed by the Subordinate Judge. In the meantime in 1946 respondents 10 to 17 had filed a suit (O.S. 77 of 1121) in the Cochin Court claimig similar reliefs in respect of the Cochin sthanam. After the judgment of the Privy Council was announced, respondents 10 to 17 withdrew the Cochin suit. The matter rested here for the time being.

On February 16, 1953, respondents 10 to 17 took the initiative again and presented a Memorial to the Madras Government asking that legislation be undertaken to reverse the Privy Council decision. The Government apparently did not think fit to take any action on that Memorial. Thereafter a suit was filed in the Court of the Subordinate Judge at Ottapalam by respondents 2 to 9 who were then the minor members of the tarwad claiming Rs. 4,23,000 as arrears of maintenance and Rs. 44,000 as yearly maintenance for the future. The suit was filed *in forma pauperis*. There were some interlocutory proceedings in this suit for compelling the defendant (*i.e.* the sthanee petitioner) to deposit the amount of the maintenance into Court which eventually came up to this Court by Special Leave but to which it is not necessary to refer in detail. During the pendency of that pauper suit, the sthanee-petitioner, on August 3, 1955, executed two deeds of gift, one in respect of the Palghat properties in favour of his wife and two daughters who are the petitioners in Petition No. 40 of 1956 and the second in respect of the Cochin properties in favour of his son who is the petitioner in Petition No. 41 of 1956.

Meanwhile respondents 2 to 17 renewed their efforts to secure legislation for the reversal of the decree of the Privy Council and eventually on August 8, 1955, procured a private member of the Madras Legislative Assembly to introduce a Bill (L.A. Bill No. 12 of 1955) intituled "The Madras Marumakkathayam (Removal of Doubts) Bill, 1955" with only two clauses on the allegation, set forth in the Statement of Objects and Reasons appended to the Bill, that certain decisions of Courts of law had departed from the age-old customary law of Marumakkathayees with regard to sthanams and sthanam properties and that those decisions were the result of a misapprehension of the customary law which governed the Marumakkathayees from ancient times and tended to disrupt the social and economic structure of several ancient Marumakkathayam families in Malabar in that Karnavans of tarwad were encouraged to claim to be sthanees and thus deny the legitimate rights of the members of tarwads with the result that litigation had arisen or were pending. It was said to be necessary, in the interests of harmony and well-being of persons following the Marumakkathayam law, that the correct position of customary law governing sthanams and sthanam properties should be clearly declared. This Bill came before the Madras Legislative Assembly on August 20, 1955, and was passed on the same day The Bill having been placed before the Madras Legislative Council, the latter passed the same on August 24, 1955. The assent of the President to the Bill was obtained on October 15, 1955, and the Act intituled "The Madras Marumakkathayam (Removal of Doubts) Act, 1955" being Madras Act XXXII of 1955 and hereinafter referred to as the impugned Act was published in the official Gazette on October 19, 1955. Section 1 of the impugned Act is concerned with the short title and its application. Section 2, which is material for our purposes, is expressed in the following terms :

"2. *Certain kinds of sthanam properties declared to be tarwad properties* :—Notwithstanding any decision of Court, any sthanam in respect of which—

(*a*) there is or had been at any time an intermingling of the properties of the sthanam and the properties of the tarwad, or

(*b*) the members of the tarwad have been receiving maintenance from the properties purporting to be sthanam properties as of right, or in pursuance of a custom or otherwise, or

(*c*) there had at any time been a vacancy caused by there being no male member of the tarwad eligible to succeed to the sthanam,

shall be deemed to be and shall be deemed always to have been a Marumakkathayam tarwad and the properties appertaining to such a sthanam shall be deemed to be and shall be deemed always to have been properties belonging to the tarwad to which the provisions of the Madras Marumakkathayam Act, 1932 (Madras Act XXII of 1933), shall apply.

Explanation.—All words and expressions used in this Act shall bear the same meaning as in the Madras Marumakkathayam Act, 1932 (Madras Act XXII of 1933)."

Almost immediately after the publication of the impugned Act in the gazette, respondents 2 to 17 published notices in "Mathrubumi", a Malayalam daily paper with large circulation in Malabar, Cochin and Travancore, to the effect that by reason of the passing of the impugned Act, Kavalappara estate had become their tarwad properties and that rents could be paid to the sthanee petitioner only as the Karnavan of the properties and not otherwise. The notices further stated that the donees under the two deeds of gift executed by the sthanee petitioner were not entitled to the properties conveyed to them and should not be paid any rent at all. After the passing of the impugned Act one of the respondents filed another suit, also *in forma pauperis* in the same Court. It is also alleged by the petitioners that respondents 2 to 17 are contemplating the filing of yet another suit for partition, taking advantage of the provisions of the impugned Act.

It was in these circumstances detailed above that the Kavalappara Moopil Nair, *i.e.*, the sthanee petitioner, on December 12, 1955, filed the present Petition No. 443 of 1955 under Article 32 of the Constitution. This was followed by Petition No. 40 of 1956 by his wife and two daughters and Petition No. 41 of 1956 by his son. Both the last mentioned petitions were filed on February 3, 1956. The first respondent in all the three petitions is the State of Madras and respondents 2 to 17 are the members of the sthanee petitioner's tarwad. In his petition the sthanee petitioner prays,

" that a writ of *mandamus* or any other proper writ, order or directions be ordered to issue for the purpose of enforcing his fundamental rights, directing the respondents to forbear from enforcing any of the provisions of the Madras Act XXXII of 1955 against the petitioner, his Kavalappara sthanam and Kavalappara estate, declaring the said Act to be unconstitutional and invalid."

The prayers in the other two petitions are *mutatis mutandis* the same.

Shri Purushottam Tricumdas appearing for some of the respondents has taken a preliminary objection as to the maintainability of the petitions. The argument in support of his objection has been developed and elaborated by him in several ways. In the first place, he contends that the petitions, in so far as they pray for the issue of a writ of *mandamus*, are not maintainable because the petitioners have an adequate remedy in that they can agitate the questions now sought to be raised on these petitions and get relief in the pauper suit filed by one of the respondents after the passing of the impugned Act. This argument overlooks the fact that the present petitions are under Article 32 of the Constitution which is itself a guaranteed right. In *Rashid Ahmed* v. *Municipal Board, Kairana*[1] this Court repelled the submission of the Advocate-General of Uttar Pradesh to the effect that, as the petitioner had an adequate legal remedy by way of appeal, this Court should not grant any writ in the nature of the prerogative writ of *mandamus* or *certiorari* and observed :

"There can be no question that the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs, but the powers given to this Court under Article 32 are much wider and are not confined to issuing prerogative writs only."

Further, even if the existence of other adequate legal remedy may be taken into consideration by the High Court in deciding whether it should issue any of the prerogative writs on an application under Article 226 of the Constitution, as to which we say nothing now—this Court cannot, on a similar ground, decline to entertain a petition under Article 32, for the right to move this Court by appropriate proceedings for the enforcement of the rights conferred by Part III of the Constitution is itself a guaranteed right. It has accordingly been held by this Court in *Romesh Thappar* v. *The State of Madras*[2], that under the Constitution this Court is constituted the protector and guarantor of fundamental rights and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking the protection of this Court against infringement of such rights, although such applications are made to this

1. (1950) S.C.J. 324 : 1950 S.C.R. 566. 1950 S.C.R. 594.
2. (1950) 2 M.L.J. 390 : (1950) S.C.J. 418 :

Court in the first instance without resort to a High Court having concurrent jurisdiction in the matter. The mere existence of an adequate alternative legal remedy cannot *per se* be a good and sufficient ground for throwing out a petition under Article 32, if the existence of a fundamental right and a breach, actual or threatened, of such right is alleged and is *prima facie* established on the petition.

The second line of argument advanced by learned counsel is that the violation of the right to property by private individuals is not within the purview of Article 19 (1) (*f*) or Article 31 (1) and that a person whose right to property is infringed by a private individual must, therefore, seek his remedy under the ordinary law and not by way of an application under Article 32. In support of this part of his argument, learned counsel relies on the decision of this Court in *P. D. Shamdasani* v. *Central Bank of India Ltd.*[1]. In that case the respondent Bank had, in exercise of its right of lien under its Articles of Association, sold certain shares belonging to the petitioner and then the latter started a series of proceedings in the High Court challenging the right of the Bank to do so. After a long lapse of time, after all those proceedings had been dismissed, the petitioner instituted a suit against the Bank challenging the validity of the sale of his shares by the Bank. The plaint was rejected by the Court under Order 7, rule 11 (*d*) of the Code of Civil Procedure as barred by limitation. Thereupon the petitioner filed an application under Article 32 of the Constitution praying that all the adverse orders made in the previous proceedings be quashed and the High Court be directed to have " the above suit set down to be heard as undefended and pronounce judgment against the respondent or to make such orders as it thinks fit in relation to the said suit." It will be noticed that the petitioner had no grievance against the State as defined in Article 12 of the Constitution and his petition was not founded on the allegation that his fundamental right under Article 19 (1) (*f*) or Article 31 (1) had been infringed by any action of the State as so defined or by anybody deriving authority from the State. The present position is, however, entirely different, for the gravamen of the complaint of the sthanee petitioner and the other petitioners, who claim title from him, is directly against the impugned Act passed by the Madras Legislature, which is within the expression "State" as defined in Article 12. Therefore in the cases now before us the petitions are primarily against the action of the State and respondents 2 to 17 have been impleaded because they are interested in denying the petitioner's rights created in their favour by the impugned Act. Indeed by means of suits and public notices, those respondents have in fact been asserting the rights conferred upon them by the impugned Act. In these circumstances, the petitioners' grievance is certainly against the action of the State which, by virtue of the definition of that term given in Article 12 of the Constitution, includes the Madras Legislature and it cannot certainly be said that the subject-matters of the present petitions comprise disputes between two sets of private individuals unconnected with any State action. Clearly disputes are between the petitioners on the one hand and the State and persons claiming under the State or under a law made by the State on the other hand. The common case of the petitioners and the respondents, therefore, is that the impugned Act does affect the right of the petitioners to hold and enjoy the properties as sthanam properties ; but, while the petitioners contend that the law is void, the respondents maintain the opposite view. In our opinion these petitions under Article 32 are not governed by our decision in *P. D. Shamdasanis' case*[1] and we see no reason why, in the circumstances, the petitioners should be debarred from availing themselves of their constitutional right to invoke the jurisdiction of this Court for obtaining redress against infringement of their fundamental rights.

The third argument in support of the preliminary point is that an application under Article 32 cannot be maintained until the State has taken or threatens to take any action under the impugned law which action, if permitted to be taken, will infringe the petitioners' fundamental rights. It is true that the enactments abolishing estates contemplated some action to be taken by the State, after the enactments came

1. (1952) 1 M.L.J. 423 : (1952) S.C.J. 29 : 1952 S.C.R. 391.

into force, by way of issuing notifications, so as to vest the estates in the State and thereby to deprive the proprietors of their fundamental right to hold and enjoy their estates. Therefore, under those enactments some overt act had to be done by the State before the proprietors were actually deprived of their right, title and interest in their estates. In cases arising under those enactments the proprietors could invoke the jurisdiction of this Court under Article 32 when the State did or threatened to do the overt act. But quite conceivably an enactment may immediately on its coming into force take away or abridge the fundamental rights of a person by its very terms and without any further overt act being done. The impugned Act is said to be an instance of such enactment. In such a case the infringement of the fundamental right is complete *eo instanti* the passing of the enactment and, therefore, there can be no reason why the person so prejudicially affected by the law should not be entitled immediately to avail himself of the constitutional remedy under Article 32. To say that a person, whose fundamental right has been infringed by the mere operation of an enactment, is not entitled to invoke the jurisdiction of this Court under Article 32, for the enforcement of his right, will be to deny him the benefit of a salutary constitutional remedy which is itself his fundamental right. The decisions of this Court do not compel us to do so. In the *State of Bombay* v. *United Motors* (*India*) *Limited*[1], the petitioners applied to the High Court on November 3, 1952, under Article 226 of the Constitution challenging the validity of the Bombay Sales Tax Act, 1952, which came into force on November 1, 1952. No notice had been issued, no assessment proceeding had been started and no demand had been made on the petitioners for the payment of any tax under the impugned Act. It should be noted that in that petition one of the grounds of attack was that the Act required the dealers, on pain of penalty, to apply for registration in some cases and to obtain a license in some other cases as a condition for the carrying on of their business, which requirement, without anything more, was said to have infringed the fundamental rights of the petitioners under Article 19 (1) (*g*) of the Constitution and no objection could, therefore, be taken to the maintainability of the application. Reference may also be made to the decision of this Court in *Himmatlal Harilal Mehta* v. *The State of Madhya Pradesh*[2]. In that case, after cotton was declared, on April 11, 1949, as liable to sales-tax under the Central Provinces and Berar Sales-tax Act, 1947, the appellant commenced paying the tax in respect of the purchases made by him and continued to pay it till December 31, 1950. Having been advised that the transactions done by him in Madhya Pradesh were not "sales" within that State and that consequently he could not be made liable to pay sales-tax in that State, the appellant declined to pay the tax in respect of the purchases made during the quarter ending March 31, 1951. Apprehending that he might be subjected to payment of tax without the authority of law, the appellant presented an application to the High Court of Judicature at Nagpur under Article 226 praying for an appropriate writ or writs for securing to him protection from the impugned Act and its enforcement by the State. The High Court declined to issue a writ and dismissed the petition on the ground that a *mandamus* could be issued only to compel an authority to do or to abstain from doing some act and that it was seldom anticipatory and was certainly never issued where the action of the authority was dependent on some action of the appellant and that in that case the appellant had not even made his return and no demand for the tax could be made from him. Being aggrieved by that decision of the High Court, the petitioner in that case came up to this Court on appeal and this Court held that a threat by the State to realise the tax from the assessee without the authority of law by using the coercive machinery of the impugned Act was a sufficient infringement of his fundamental right which gave him a right to seek relief under Article 226 of the Constitution. It will be noticed that the Act impugned in that case had by its terms made it incumbent on all dealers to submit returns, etc., and thereby imposed restrictions on their fundamenal right to carry on their businesses under Article 19 (1) (*g*). The present case, however, stands on a much stronger footing. The sthanee petitioner is the Kavalappara Moopil Nair and as

1. (1953) 1 M.L.J. 743 : (1953) S.C.J. 373 : 1953 S.C.R. 1069.

2. (1954) 1 M.L.J. 690 : (1954) S.C.J. 445 : 1954 S.C.R. 1122.

such holds certain sthanams and the petitioners in Petitions Nos. 40 and 41 of 1956 derive their titles from him. According to the petitioners, the sthanee petitioner was absolutely entitled to all the properties attached to all the sthanams and respondents 2 to 17 had no right, title or interest in any of the sthanam properties. Immediately after the passing of the impugned Act, the Madras Marumakkathayam Act, 1932, became applicable to the petitioners' sthanams and the petitioners' properties became subject to the obligations and liabilities imposed by the last mentioned Act. On the passing of the impugned Act, the sthanee petitioner immediately became relegated from the status of a sthanee to the status of a Karnavan and manager and the sthanam properties have become the tarwad properties and respondents 2 to 17 have automatically become entitled to a share in those properties along with the petitioners. The right, title or interest claimed by petitioners in or to their sthanam properties is, by the operation of the statute itself and without anything further being done, automatically taken away or abridged and the impugned Act has the effect of automatically vesting in respondents 2 to 17 an interest in those properties as members of the tarwad. Indeed respondents 2 to 17 are asserting their rights and have issued public notices on the basis thereof and have also instituted a suit on the strength of the rights created in them by the impugned Act. Nothing further remains to be done to infringe the petitioners' right to the properties as sthanam properties. It is true that the sthanee petitioner or the other petitioners deriving title from him are still in possession of the sthanam properties, but in the eye of law they no longer possess the right of the sthanee and they cannot, as the sthanee or persons deriving title from the sthanee, lawfully claim any rent from the tenants. In view of the language employed in section 2 quoted above and its effect the petitioners can legitimately complain that their fundamental right to hold and dispose of the sthanam properties has been injured by the action of the Legislature which is "State" as defined in Article 12 of the Constitution. In the premises, the petitioners are *prima facie* entitled to seek their fundamental remedy under Article 32.

The next argument in support of the objection as to the maintainability of these petitions is thus formulated : The impugned Act is merely a piece of a declaratory legislation and does not contemplate or require any action to be taken by the State or any other person and, therefore, none of the well-known prerogative writs can afford an adequate or appropriate remedy to a person whose fundamental right has beeu infringed by the mere passing of the Act. If such a person challenges the validity of such an enactment, he must file a regular suit in a Court of competent jurisdiction for getting a declaration that the law is void and, therefore, cannot and does not affect his right. In such a suit he can also seek consequential reliefs by way of injunction or the like, but he cannot avail himself of the remedy under Article 32. In short, the argument is that the proceeding under Article 32 cannot be converted into or equated with a declaratory suit under section 42 of the Specific Relief Act. Reference is made in support of the aforesaid contention, to the following passage in the judgment of Mukherjea, J., as he then was, in the case of *Chiranjit Lal Chowdhuri* v. *The Union of India*[1] :

"As regards the other point, it would appear from the language of Article 32 of the Constitution that the sole object of the article is the enforcement of fundamental rights guaranteed by the Constitution. A proceeding under this article cannot really have any affinity to what is known as a declaratory suit".

But further down on the same page his Lordship said :—

"Anyway, Article 32 of the Constitution gives us very wide discretion in the matter of framing our writs to suit the exigencies of particular cases, and the application of the petitioner cannot be thrown out simply on the ground that the proper writ or direction has not been prayed for."

It should be noted that though in that case the petitioner prayed, *inter alia*, for a declaration that the Act complained of was void under Article 13 of the Constitution it was not thrown out on that ground. The above statement of the law made by

1. (1951) S.C.J. 29 : 1950 S.C.R. 869, 900.

Mukherjea, J., is in accord with the decision of this Court in the earlier case of *Rashid Ahmed* v. *Municipal Board, Kairana*[1]. The passage from our judgment in that case, which has already been quoted above, also acknowledges that the powers given to this Court by Article 32 are much wider and are not confined to the issuing of prerogative writs only. The matter does not rest there. In *T. C. Basappa* v. *T. Nagappa*[2], Mukherjea, J., again expressed the same view :—

"The language used in Articles 32 and 226 of our Constitution is very wide and the powers of the Supreme Court as well as of all the High Courts in India extend to issuing of orders, writs of directions including writs in the nature of *habeas corpus, mandamus, quo warranto,* prohibition and *certiorari* as may be considered necessary for enforcement of the fundamental rights and in the case or the High Courts, for other purposes as well. In view of the express provisions of our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges."

In *Ebrahim Vazir Mayat* v. *The State of Bombay*[3], the order made by the majority of this Court was framed as follows :

"As a result of the foregoing discussion we declare section 7 to be void under Article 31 (1) in so far as it conflicts with the fundamental right of a citizen of India under Article 19 (1) (*e*) of the Constitution and set it aside. The order will, however, operate only upon proof of the fact that the appellants are citizens of India. The case will, therefore, go back to the High Court for a finding upon this question. It will be open to the High Court to determine this question itself or refer it to the Court of District Judge for a finding."

That was a case of an appeal coming from a High Court and there was no difficulty in remanding the case for a finding on an issue, but the fact to note is that this Court did make a declaration that section 7 of the Act was void. We are not unmindful of the fact that in the case of *Maharaj Umeg Singh* v. *The State of Bombay*[4], which came up before this Court on an application under Article 32, the petitioner had been relegated to filing a regular suit in a proper Court having jurisdiction in the matter. But on a consideration of the authorities it appears to be well-established that this Court's powers under Article 32 are wide enough to make even a declaratory order where that is the proper relief to be given to the aggrieved party. The present case appears to us precisely to be an appropriate case, if the impugned Act has taken away or abridged the petitioners' right under Article 19 (1) (*f*) by its own terms and without anything more being done and such infraction cannot be justified. If, therefore, the contentions of the petitioners be well founded, as to which we say nothing at present, a declaration as to the invalidity of the impugned Act together with the consequential relief by way of injunction restraining the respondents and in particular respondents 2 to 17 from asserting any rights under the enactment so declared void will be the only appropriate reliefs which the petitioners will be entitled to get. Under Article 32 we must, in appropriate cases, exercise our discretion and frame our writ or order to suit the exigencies of this case brought about by the alleged nature of the enactment we are considering. In a suit for a declaration of their titles on the impugned Act being declared void, respondents 2 to 17 will certainly be necessary parties, as persons interested to deny the petitioners' title. We see no reason why in an application under Article 32 where declaration and injunction are proper reliefs, respondents 2 to 17 cannot be made parties. In our opinion, therefore, there is no substance in the argument advanced by learned counsel on this point.

The last point urged in support of the plea as to the non-maintainability of these applications is that this Court cannot, on an application under Article 32, embark upon an enquiry into disputed questions of fact. The argument is developed in this way. In the present case the petitioners allege, *inter alia,* that the impugned Act has deprived them of their fundamental right to the equal protection of the law and equality before the law guaranteed by Article 14 of the Constitution. Their complaint is that they have been discriminated against in that they and their sthanam properties have been singled out for hostile treatment by the Act. The petitioners contend that there is no other sthanam which comes within the purview of this enact-

1. (1950) S.C.J. 324 : 1950 S.C.R. 566.
2. (1954) S.C.J. 695 : (1955) 1 S.C.R. 250, 256 : I.L.R. (1954) Mys. 235.
3. 1954 S.C.R. 933, 941.
4. (1955) S.C.J. 472 : (1955) 2 S.C.R. 164.

ment and that they and the sthanams held by them are the only target against which this enactment is directed. The respondents, on the other hand, contend that the language of section 2 is wide and general and the Act applies to all sthanams to which one or more of the conditions specified in section 2 may be applicable and that this Court cannot, on an application under Article 32, look at any extraneous evidence but must determine the issue on the terms of the enactment alone and that in any event this Court cannot go into disputed questions of fact as to whether there are or are not other sthanees or sthanams similarly situate as the petitioners are. In support of his contention Shri Purushottam Tricumdas refers us to some decisions where some of the High Courts have declined to entertain applications under Article 226 of the Constitution involving disputed questions of fact and relegated the petitioners to regular suits in Courts of competent jurisdiction. We are not called upon, on this occasion, to enter into a discussion or express any opinion as to the jurisdiction and power of the High Courts to entertain and to deal with applications under Article 226 of the Constitution where disputed questions of fact have to be decided and we prefer to confine our observations to the immediate problem now before us, namely, the limits of the jurisdiction and power of this Court when acting under Article 32 of the Constitution. Shri Purushottam Tricumdas concedes that the petitioners have the fundamental right to approach this Court for relief against infringement of their fundamental right. What he says is that the petitioners have exercised that fundamental right and that this fundamental right goes no further. In other words, he maintains that nobody has the fundamental right that this Court must entertain his petition or decide the same when disputed questions of fact arise in the case. We do not think that that is a correct approach to the question. Clause (2) of Article 32 confers power on this Court to issue directions or orders or writs of various kinds referred to therein. This Court may say that any particular writ asked for is or is not appropriate or it may say that the petitioner has not established any fundamental right or any breach thereof and accordingly dismiss the petition. In both cases this Court decides the petition on merits. But we do not countenance the proposition that, on an application under Article 32, this Court may decline to entertain the same on the simple ground that it involves the determination of disputed questions of fact or on any other ground. If we were to accede to the aforesaid contention of learned counsel, we would be failing in our duty as the custodian and protector of the fundamental rights. We are not unmindful of the fact that the view that this Court is bound to entertain a petition under Article 32 and to decide the same on merits may encourage litigants to file many petitions under Article 32 instead of proceeding by way of a suit. But that consideration cannot, by itself, be a cogent reason for denying the fundamental right of a person to approach this Court for the enforcement of his fundamental right which may, *prima facie*, appear to have been infringed. Further, questions of fact can and very often are dealt with on affidavits. In *Chranjitlal Chowdhuri's case*[1] this Court did not reject the petition *in limine* on the ground that it required the determination of disputed questions of fact as to there being other companies equally guilty of mismanagement. It went into the facts on the affidavits and held, *inter alia*, that the petitioner had not discharged the onus that lay on him to establish his charge of denial of equal protection of the laws. That decision was clearly one on merits and is entirely different from a refusal to entertain the petition at all. In *Kathi Raning Rawat* v. *The State of Saurashtra*[2] the application was adjourned in order to give the respondent in that case an opportunity to adduce evidence before this Court in the form of an affidavit. An affidavit was filed by the respondent setting out facts and figures relating to an increasing number of incidents of looting, robbery, dacoity, nose-cutting and murder by marauding gangs of dacoits in certain areas of the State in support of the claim of the respondent State that

> "the security of the State and public peace were jeopardised and that it became impossible to deal with the offences that were committed in different places in separate Courts of law expeditiously".

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1. (1951) S.C.J. 29: 1950 S.C.R. 869, 900. 2. (1952) S.C.J. 168 : 1952 S.C.R. 435.

This Court found no difficulty in dealing with that application on evidence adduced by affidavit and in upholding the validity of the Act then under challenge. That was also a decision on merits although there were disputed questions of fact regarding the circumstances in which the impugned Act came to be passed. There were disputed questions of fact also in the case of *Ramakrishna Dalmia* v. *Shri Justice S. R. Tendolkar*[1]. The respondent State relied on the affidavit of the Principal Secretary to the Finance Ministry setting out in detail the circumstances which led to the issue of the impugned notification and the matters recited therein and the several reports referred to in the said affidavit. A similar objection was taken by learned counsel for the petitioners in that case as has now been taken. It was urged that reference could not be made to any extraneous evidence and that the basis of classification must appear on the face of the notification itself and that this Court should not go into disputed questions of fact. This Court overruled that objection and held that there could be no objection to the matters brought to the notice of the Court by the affidavit of the Principal Secretary being taken into consideration in order to ascertain whether there was any valid basis for treating the petitioners and their companies as a class by themselves. As we have already said, it is possible very often to decide questions of fact on affidavits. If the petition and the affidavits in support thereof are not convincing and the Court is not satisfied that the petitioner has established his fundamental right or any breach thereof, the Court may dismiss the petition on the ground that the petitioner has not discharged the onus that lay on him. The Court may, in some appropriate cases, be inclined to give an opportunity to the parties to establish their respective cases by filing further affidavits or by issuing a commission or even by setting the application down for trial on evidence, as has often been done on the original sides of the High Courts of Bombay and Calcutta, or by adopting some other appropriate procedure. Such occasions will be rare indeed and such rare cases should not, in our opinion, be regarded as a cogent reason for refusing to entertain the petition under Article 32 on the ground that it involves disputed questions of fact.

For reasons given above we are of opinion that none of the points urged by learned counsel for the respondents in support of the objection to the maintainability of these applications can be sustained. These applications will, therefore, have to be heard on merits and we order accordingly. The respondents represented by Shri Purushottam Tricumdas must pay one set of costs of the hearing of this preliminary objection before us to the petitioners.

Wanchoo, J.—I have read the judgment just delivered by my Lord the Chief Justice, with which my other brethren concur, with great care. With the utmost respect for my brethren for whom I have the highest regard, I must state that if these applications were based only on the infringement of Article 14 of the Constitution, I would have no hesitation in dismissing them as not maintainable. I need not elaborate my reasons in this case and shall content myself by observing that where the law, as in this case, is general in terms and there is no question of its direct enforcement by the State in the form, for example, of grant of licences, issue of notices, submission of returns, and so on, actually resulting in wholesale abuse of its provisions, this Court will not permit an applicant under Article 32 to lead evidence to show that the law was meant to hit him alone. However, the applicants also rely on the infringement of the fundamental right guaranteed under Article 19 (1) (*f*). As to that, I have doubts whether an application under Article 32 challenging a general law of this kind, which affects one or other of the fundamental rights guaranteed under Article 19, can be maintained, in the absence of any further provision therein for direct enforcement of its provisions by the State in the form already indicated above, by a person who merely apprehends that he might in certain eventualities be affected by it. However, on the present occasion, I do not propose to press my doubts to the point of dissent and therefore concur with the proposed order.

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Preliminary objections overruled;
Petitions to be heard.

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1. Since Reported in (1959) S.C.J. 147 : (1959) 1 M.L.J. 67 (S.C.) : (1959) 1 An.W.R. (S.C.) 67 : 1959 S.C.R. 279.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. J. IMAM, A. K. SARKAR AND K. SUBBA RAO, JJ.

Gherulal Parakh .. *Appellant**

v.

Mahadeodas Maiya and others .. *Respondents.*

Contract Act (IX of 1872), *sections* 23 *and* 30—*Partnership entered into to carry on wagering contracts—If contract illegal. opposed to public policy, or immoral—Suit by one partner after dissolution for recovery of share of loss from other partner—Maintainability.*

The Appellant and the Respondent entered into a partnership for carrying on wagering transactions and the Respondent who carried on the transactions on behalf of the partnership claimed the share of loss incurred in respect of those transactions from the Appellant. The claim was resisted on the ground that (i) the object is forbidden by law (ii) it is opposed to public policy and (iii) it is immoral. Rejecting the contentions and allowing the claim.

Held : (i) Section 30 of the Indian Contract Act is based upon the provisions of section 18 of the Gaming Act of 1845 and though a wager is void and unenforceable, it is not forbidden by law and therefore the object of a collateral agreement is not unlawful under section 23 of the Contract Act; and partnership being an agreement within the meaning of section 23 of the Indian Contract Act, it is not unlawful, though its object is to carry on wagering transactions.

(ii) The Common Law of England and that of India have never struck down contracts of wager on the ground of public policy ; indeed they have always been held to be not illegal notwithstanding the fact that the statute declared them void. Even after the contracts of wager were declared to be void in England, collateral contracts were enforced till the passing of the Gaming Act of 1892, and in India, except in the State of Bombay, they have been enforced even after the passing of the Act XXI of 1848, which was substituted by section 30 of the Contract Act. The moral prohibitions of Hindu Law texts against gambling were not legally enforced but were allowed to fall into desuetude. In practice, though gambling is controlled in specific matters, it has not been declared illegal and there is no law declaring wagering illegal. In the circumstances it is not possible to hold that there is any head or principle of public policy which would directly apply to wagering contracts.

(iii) Precedents confine the concept of "immorality" only to sexual immorality and Courts cannot evolve a new head so as to bring in wagers within its fold.

Accordingly the suit partnership was not unlawful within the meaning of section 23 of the Indian Contract Act.

Appeal from the Judgment and Decree dated the 1st April, 1953, of the Calcutta High Court in Appeal from Original Decree No. 89 of 1946, arising out of the Judgment and Decree dated the 4th December, 1945, of the Subordinate Judge, Darjeeling, in Money Suit No. 5 of 1940.

L.K. Jha, Senior Advocate (*D.N. Mukherjee*, Advocate with him), for Appellant.

C. B. Aggarwala, Senior Advocate, (*K. B. Bagchi* and *Sukumar Ghose*, Advocates with him), for Respondents Nos. 1 to 5.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal filed against the judgment of the High Court of Judicature at Calcutta raises the question of the legality of a partnership to carry on business in wagering contracts.

The facts lie in a small compass. They, omitting those not germane to the controversy before us, are as follows : The appellant, Gherulal Parakh, and the first respondent, Mahadeodas Maiya, managers of two joint families entered into a partnership to carry on wagering contracts with two firms of Hapur, namely, Messrs. Mulchand Gulzarimull and Baldeosahay Surajmull. It was agreed between the partners that the said contracts would be made in the name of the respondents on behalf of the firm and that the profit and loss resulting from the transactions would be borne by them in equal shares. In implementation of the said agreement, the first respondent entered into 32 contracts with Mulchand and 49 contracts with Baldeosahay and the net result of all these transactions was a loss,

* C.A. No. 215 of 1955. 26th March, 1959.

with the result that the first respondent had to pay to the Hapur merchants the entire amount due to them. As the appellant denied his liability to bear his share of the loss, the first respondent along with his sons filed O.S. No. 18 of 1937 in the Court of the Subordinate Judge, Darjeeling, for the recovery of half of the loss incurred in the transactions with Mulchand. In the plaint he reserved his right to claim any further amount in respect of transactions with Mulchand that might be found due to him after the accounts were finally settled with him. That suit was referred to arbitration and on the basis of the award, the Subordinate Judge made a decree in favour of the first respondent and his sons for a sum of Rs. 3,375. After the final accounts were settled between the first respondent and the two merchants of Hapur and after the amounts due to them were paid, the first respondent instituted a suit, out of which the present appeal arises, in the Court of the Subordinate Judge, Darjeeling, for the recovery of a sum of Rs. 5,300 with interest thereon. Subsequently the plaint was amended and by the amended plaint the respondents asked for the same relief on the basis that the firm had been dissolved. The appellant and his sons, *inter alia*, pleaded in defence that the agreement between the parties to enter into wagering contracts was unlawful under section 23 of the Contract Act, that as the partnership was not registered, the suit was barred under section 69 (1) of the Partnership Act and that in any event the suit was barred under Order 2, rule 2 of the Code of Civil Procedure. The learned Subordinate Judge found that the agreement between the parties was to enter into wagering contracts depending upon the rise and fall of the market and that the said agreement was void as the said object was forbidden by law and opposed to public policy. He also found that the claim in respect of the transactions with Mulchand so far as it was not included in the earlier suit was not barred under Order 2, rule 2, Code of Civil Procedure, as the cause of action in respect of that part of the claim did not arise at the time the said suit was filed. He further found that the partnership was between the two joint families of the appellant and the first respondent respectively, that there could not be in law such a partnership and that therefore, section 69 of the Partnership Act was not applicable. In the result, he dismissed the suit with costs.

On appeal, the learned Judges of the High Court held that the partnership was not between the two joint families but was only between the two managers of the said families and therefore it was valid. They found that the partnership to do business was only for a single venture with each one of the two merchants of Hapur and for a single season and that the said partnership was dissolved after the season was over and therefore the suit for accounts of the dissolved firm was not hit by the provisions of sub-sections (1) and (2) of section 69 of the Partnership Act. They further found that the object of the partners was to deal in differences and that though the said transactions, being in the nature of wager, were void under section 30 of the Indian Contract Act, the object was not unlawful within the meaning of section 23 of the said Act.

In regard to the claim, the learned Judges found that there was no satisfactory evidence as regards the payment by the first respondent on account of loss incurred in the contracts with Mulchand but it was established that he paid a sum of Rs. 7,615 on account of loss in the contracts entered into with Baldeosahay. In the result, the High Court gave a decree to the first respondent for a sum of Rs. 3,807-8-0 and disallowed interest thereon for the reason that as the suit in substance was one for accounts of a dissolved firm, there was no liability in the circumstances of the case to pay interest. In the result, the High Court gave a decree in favour of the first respondent for the said amount together with another small item and dismissed the suit as regards " the plaintiffs other than the first respondent and the defendants other than the appellant."

Before we consider the question of law raised in the case, it would be convenient at the outset to dispose of questions of fact raised by either party. The learned counsel for the appellant contends that the finding of the learned Judges of the High Court that the partnership stood dissolved after the season was over was not supported by the pleading or the evidence adduced in the case. In the plaint as originally

drafted and presented to the Court, there was no express reference to the fact that the business was dissolved and no relief was asked for accounts of the dissolved firm. But the plaint discloses that the parties jointly entered into contracts with two merchants between March 23, 1937, and June 17, 1937, that the plaintiffs obtained complete accounts of profits and loss on the aforesaid transactions from the said merchants after June 17, 1937, and that they issued a notice to the defendants to pay them a sum of Rs. 4,146-4-3, being half of the total payments made by them on account of the said contracts and that the defendants denied their liability. The suit was filed for recovery of the said amount. The defendant filed a written statement on June 12, 1940, but did not raise the plea based on section 69 of the Partnership Act. He filed an additional written-statement on November 9, 1941, expressly setting up the plea. Thereafter the plaintiffs prayed for the amendment of the plaint by adding the following to the plaint as paragraph 10 :

"That even section 69 of the Indian Partnership Act is not a bar to the present suit as the joint business referred to above was dissolved and in this suit the Court is required only to go into the accounts of the said joint business."

On August 14, 1942, the defendant filed a further additional written statement alleging that the allegations in paragraph 2 were not true and that as no date of the alleged dissolution had been mentioned in the plaint, the plaintiff's case based on the said alleged dissolution was not maintainable, It would be seen from the aforesaid pleadings that though an express allegation of the fact of dissolution of the partnership was only made by an amendment on November 17, 1941, the plaint as orginally presented contained all the facts sustaining the said plea. The defendants in their written statement. *inter alia,* denied that there was any partnership to enter into forward contracts with the said two merchants and that therefore consistent with their case they did not specifically deny the said facts. The said facts, except in regard to the question whether the partnership was between the two families or only between the two managers of the families on which there was difference of view between the Court of the Subordinate Judge and the High Court, were concurrently found by both the Courts. It follows from the said findings that the partnership was only in respect of forward contracts with two specified individuals and for a particular season. But it is said that the said findings were not based on any evidence in the case. It is true that the documents did not clearly indicate any period limiting the operation of the partnership, but from the attitude adopted by the defendants in the earlier suit ending in an award and that adopted in the present pleadings, the nature of the transactions and the conduct of the parties, no other conclusion was possible than that arrived at by the High Court. If so, section 42 of the Partnership Act directly applies to this case. Under that section in the absence of a contract to the contrary, a firm is dissolved, if it is constituted to carry out one or more adventures or undertakings, by completion thereof. In this case, the partnership was constituted to carry out contracts with specified persons during a particular season and as the said contracts were closed, the partnership was dissolved.

At this stage a point raised by the learned counsel for the respondents may conveniently be disposed of. The learned counsel contends that neither the learned Subordinate Judge nor the learned Judges of the High Court found that the first respondent entered into any wagering transactions with either of the two merchants of Hapur and therefore no question of illegality arises in this case. The law on the subject is well-settled and does not call for any citation of cases. To constitute a wagering contract there must be proof that the contract was entered into upon terms that the performance of the contract should not be demanded, but only the difference in prices should be paid. There should be common intention between the parties to the wager that they should not demand delivery of the goods but should take only the difference in prices on the happening of an event. Relying upon the said legal position, it is contended that there is no evidence in the case to establish that there was a common intention between the first respondent and the Hapur merchants not to take delivery of possession but only to gamble in difference in prices. This argument, if we may say so, is not really germane to the question raised in this case.

The suit was filed on the basis of a dissolved partnership for accounts. The defendants contended that the object of the partnership was to carry on wagering transactions, *i.e.*, only to gamble in differences without any intention to give or take delivery of goods. The Courts, on the evidence, both direct and circumstantial, came to the conclusion that the partnership agreement was entered into with the object of carrying on wagering transactions wherein there was no intention to ask for or to take delivery of goods but only to deal with differences. That is a concurrent finding of fact, and, following the usual practice of this Court, we must accept it. We, therefore, proceed on the basis that the appellant and the first respondent entered into a partnership for carrying on wagering transactions and the claim related only to the loss incurred in respect of those transactions.

Now we come to the main and substantial point in the case. The problem presented, with its different facets, is whether the said agreement of partnership is unlawful within the meaning of section 23 of the Indian Contract Act. Section 23 of the said Act, omitting portions unnecessary for the present purpose, reads as follows :—

> " The consideration or object of an agreement is lawful, unless—
>
> it is forbidden by law, or
>
> ....
>
> the Court regards it as immoral, or opposed to public policy.
>
> In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

Under this section, the object of an agreement, whether it is of partnership or otherwise, is unlawful if it is forbidden by law, or the Court regards it as immoral or opposed to public policy and in such case the agreement itself is void.

The learned counsel for the appellant advances his argument under three subheads: (i) the object is forbidden by law, (ii) it is opposed to public policy, and (iii) it is immoral. We shall consider each one of them separately.

Re. (i)—*forbidden by law* : Under section 30 of the Indian Contract Act, agreements by way of a wager are void ; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made. Sir William Anson's definition of " wager " as a promise to give money or money's worth upon the determination or ascertainment of an uncertain event accurately brings out the concept of wager declared void by section 30 of the Contract Act. As a contract which provides for payment of differences only without any intention on the part of either of the parties to give or take delivery of the goods is admittedly a wager within the meaning of section 30 of the Contract Act, the argument proceeds, such a transaction, being void under the said section, is also forbidden by law within the meaning of section 23 of the Contract Act. The question, shortly stated, is whether what is void can be equated with what is forbidden by law. This argument is not a new one, but has been raised in England as well as in India and has uniformly been rejected. In England the law relating to gaming and wagering contracts is contained in the Gaming Acts of 1845 and 1892. As the decisions turned upon the relevant provisions of the said Acts, it would help to appreciate them better if the relevant sections of the two Acts were read at this stage :

> " *Section* 18 *of the Gaming Act,* 1845 :—*Contracts by way of gaming to be void and wagers or sums deposited with stakeholders not to be recoverable at law—Saving or subscriptionr or prizes.*— ....All contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void ; and............no suit shall be brought or maintained in any Court of law and equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made : Provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize or sum of money to be awarded to the winner or winners of any lawful game sport, pastime or exercise."

"*Section 1 of the Gaming Act*, 1892 :—*Promises to repay sums paid under contracts void by* 8 & 9 *Vict. c.* 109 *to be null and void.*—Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Gaming Act, 1845, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connexion therewith shall be null and void, and no action shall be brought or maintained to recover any such sum of money."

While the Act of 1845 declared all kinds of wagers or games null and void, it only prohibited the recovery of money or valuable thing won upon any wager or deposited with stakeholders. On the other hand, the Act of 1892 further declared that moneys paid under or in respect of wagering contracts dealt with by the Act of 1845 are not recoverable and no commission or reward in respect of any wager can be claimed in a Court of law by agents employed to bet on behalf of their principals. The law of England till the passing of the Act of 1892 was analogous to that in India and the English law on the subject governing a similar situation would be of considerable help in deciding the present case. Sir William Anson in his book " On Law of Contracts " succinctly states the legal position thus at page 205 :

"...........the law may either actually forbid an agreement to be made, or it may merely say that if it is made the Courts will not enforce it. In the former case it is illegal, in the latter only void; but inasmuch as illegal contracts are also void, though void contracts are not necessarily illegal the distinction is for most purposes not important, and even Judges seem sometimes to treat the two terms as inter-changeable".

The learned author proceeds to apply the said general principles to wagers and observes, at page 212, thus :

" Wagers being only void, no taint of illegality attached to a transaction, whereby one man employed another to make bets for him; the ordinary rules which govern the relation of employer and employed applied in such a case."

Pollock and Mulla in their book on Indian Contract define the phrase " forbidden by law " in section 23 thus, at page 158 :

"An act or undertaking is equally forbidden by law whether it violates a prohibitory enactmen of the Legislature or a principle of unwritten law. But in India, where the criminal law is codified acts forbidden by law seem practically to consist of acts punishanle under the Penal Code and of acts prohibited by special legislation, or by regulations or orders made under authority derived from the Legislature."

Some of the decisions, both English and Indian, cited at the Bar which bring out the distinction between a contract which is forbidden by law and that which is void may now be noticed. In *Thacker* v. *Hardy*[1], the plaintiff, a broker, who was employed by the defendant to speculate for him upon the stock exchange, entered into contracts on behalf of the defendant with a third party upon which he (the plaintiff) became personally liable. He sued the defendant for indemnity against the liability incurred by him and for commission as broker. The Court held that the plaintiff was entitled to recover notwithstanding the provisions of 8 and 9 Vic. c. 109, section 18 (English Gaming Act, 1845). Lindley, J., observed at page 687:

"Now, if gaming and wagering were illegal, I should be of opinion that the illegality of the transactions in which the plaintiff and the defendant were engaged would have tainted, as between themselves, whatever the plaintiff had done in furtherance of their illegal designs, and would have precluded him from claiming, in a Court of law, any indemnity from the defendant in respect of the liabilities he had incurred : *Cannan* v. *Bryce*[2], *McKinnel* v. *Robinson*[3], *Lyne* v. *Siesfeld*[4]. But it has been held that although gaming and wagering contracts cannot be enforced, they are not illegal. *Fitch* v. *Jones*[5], is plain to that effect. Money paid in discharge of a bet is a good consideration for a bill of exchange : *Oulds* v. *Harrison*[6] ; and if money be so paid by a plaintiff at the request of a defendant, it can be recovered by action against him : *Knight* v. *Camber*[7] ; *Jessop* v. *Lutwyoho*[8], *Rosewarne* v. *Billing*[9] ; and it has been held that a request to pay may be inferred from an authority to bet : *Oldham* v. *Ramsden*[10]. Having regard to these decisions, I cannot hold that the statute above referred to precludes the plaintiff from maintaining this action."

1. (1878) L.R. 4 Q.B. 685.
2. 3 B. & Ald. 179.
3. 3 M. & W. 434.
4. 1 H. & N. 278.
5. 5 E. & B. 238.
6. 10 Ex. 572.
7. 15 C.B. 562.
8. 10 Ex. 614.
9. 15 C.B. (N.S.) 316.
10. 44 L.J. (C.P.) 309.

In *Read* v. *Anderson*[1], where an agent was employed to make a bet in his own name on behalf of his principal, a similar question arose for consideration. Hawkins, J., states the legal position at page 104 :

"At common law wagers were not illegal, and before the passing of 8 & 9 Vict. c. 109 action were constantly brought and maintained to recover money won upon them. The object of 8 & 9, Vict. c. 109 (passed in 1845) was not to render illegal wagers which up to that time had been lawful but simply to make the law no longer available for their enforcement leaving the parties to them to pay them or not as their sense of honour might dictate."

After citing the provisions of section 18 of that Act, the learned Judge proceeds to observe thus, at page 105 :

"There is nothing in this language to affect the legality of wagering contracts, they are simply rendered null and void ; and not enforceable by any process of law. A host of authorities have settled this to be the true effect of the Statute."

This Judgment of Hawkins, J., was confirmed on appeal[2] on the ground that the agency became irrevocable on the making of the bet. The judgment of the Court of Appeal cannot be considered to be a direct decision on the point. The said principle was affirmed by the Court of Appeal again in *Bridger* v. *Savage*[3]. There the plaintiff sued his agent for the amount received by him in respect of the winnings from the persons with whom the agent had betted. Brett, M.R., observed at page 366 :

"................the defendant has received money which he contracted with the plaintiff to hand over to him when he had received it. That is a perfectly legal contract ; but for the defendant it has been contended that the statute 8 & 9 Vict. c. 109, section 18 makes that contract illegal. The answer is that it has been held by the Courts on several occasions that the statute applies only to the original contract made between the persons betting, and not to such a contract as was made here between the plaintiff and defendant."

Bowen, L.J., says much to the same effect at page 367 :

"Now with respect to the principle involved in this case, it is to be observed that the original contract of betting is not an illegal one, but only one which is void. If the person who has betted pays his bet, he does nothing wrong ; he only waives a benefit which the statute has given to him and confers a good title to the money on the person to whom he pays it. Therefore when the bet is paid the transaction is completed, and when it is paid to an agent it cannot be contended that it is not a good payment for his principal..........So much, therefore, for the principle governing this case. As to the authorities, the cases of *Sharp* v. *Taylor*[4], *Johnson* v. *Lansley*[5] and *Beeston* v. *Beeston*[6] all go to shew that this action is maintainable, and the only authority the other way is that of *Beyer* v. *Adams*[7], and that case cannot be supported, and is not law."

This case lays down the correct principle and is supported by earlier authorities. The decision in *Partridge* v. *Mallandaine*[8], is to the effect that persons receiving profits, from betting systematically carried on by them are chargeable with income-tax on such profits in respect of a "vocation" under 5 & 6 Vict. c. 35 (the Income-tax Act) Schedule D. Hawkins, J., rejecting the argument that the profession of bookmakers is not a calling within the meaning of the Income-tax Act, makes the following observations, at page 278 :

"Mere betting is not illegal. It is perfectly lawful for a man to bet if he likes. He may, however, have a difficulty in getting the amount of the bets from dishonest persons who make bets and will not pay."

The decision in *Hyams* v. *Stuart King*[9], deals with the problem of the legality of a fresh agreement between parties to a wager for consideration. There, two bookmakers had betting transactions together, which resulted in the defendant giving the plaintiff a cheque for the amount of bets lost to him. At the request of the defendant, the cheque was held over by the plaintiff for a time, and part of the amount of the cheque was paid by the defendant. Subsequently a fresh verbal agreement was come to between the parties, by which, in consideration of the plaintiff holding over

1. (1882) L.R. 10 Q.B. 100.
2. Reported in L.R. 13 Q.B. 779.
3. (1885) L.R. 15 Q.B. 363.
4. 2 Phil. 801.
5. 12 C.B. 468.
6. 1 Ex. D. 13.
7. 26 L.J. (Ch.) 481.
8. L.R. 18 Q.B. 276.
9. L.R. (1908) 2 K.B. 696.

the cheque for a further time and refraining from declaring the defendant a defaulter and thereby injuring him with his customers, the defendant promised to pay the balance owing in a few days. The balance was never paid and the plaintiff filed a suit to recover the money on the basis of the fresh verbal agreement. The Court of Appeal, by a majority, Fletcher Moulton, L.J., dissenting, held that the fresh verbal agreement was supported by good consideration and therefore the plaintiff was entitled to recover the amount due to him. At page 705, Sir Gorell Barnes posed the following three questions to be decided in the case : (1) Whether the new contract was itself one which falls within the provisions of 8 & 9 Vict. c. 109, section 18; (2) whether there was any illegality affecting that contract ; and (3) whether that contract was a lawful contract founded on good consideration. Adverting to the second question, which is relevant to the present case, the President made the following observations at page 707 :

"...........it is to be observed that there was nothing illegal in the strict sense in making the bets. They were merely void under 8 & 9 Vict. c. 109, and there would have been no illegality in paying them. There is no doubt whatever about this. There was also nothing illegal in giving the cheque nor would there have been any illegality in paying it, though the defendants could not have been compelled by the plaintiff to pay it, because by staute it was to be deemed and taken to have been made and given for an illegal consideration, and therefore void in the hands of the plaintiff ....The statutes do not make the giving or paying of the cheque illegal, and impose no penalty for so doing. Their effect and intention appear only, so far as material, to be that gaming or wagering contracts cannot be enforced in a Court of Law or Equity............"

The view expressed by the President is therefore consistent with the view all along accepted by the Courts in England. This case raised a new problem, namely, whether a substituted agreement for consideration between the same parties to the wager could be enforced, and the majority held that it could be enforced, while Fletcher Moulton, L.J., recorded his dissent. We shall have occasion to notice the dissenting view of Flectcher Moulton, L.J., at a later stage. The aforesaid decisions establish the proposition that in England a clear ditinction is maintained between a contract which is void and that which is illegal and it has been held that though a wagering contract is void and unenforceable between parties, it is not illegal and therefore it does not affect the validity of a collateral contract.

The same principle has been applied to collateral contracts of partnership also. In *Thwaites* v. *Coulthwaite*[1], the question of legality of a partnership of bookmaking and betting was raised. There the plaintiff and defendant were partners in a bookmakers and betting business, which was carried on by the defendant; the plaintiff claimed an account of the profits of the partnership, and the defendant contended that having regard to the nature of the business, no such relief could be obtained. Chitty, J., rejected the plea holding that the partnership was valid, for the following reasons, among others, and stated at page 498:

"The Gaming Act, 1845 (8 & 9 Vict. c. 109), did not make betting illegal ; this statute, as is well known, merely avoided the wagering contract. A man may make a single bet or many bets ; he may habitually bet ; he may carry on a betting or bookmakers business within the statute provided the business as carried on by him does not fall within the prohibition of the Betting Act, 1853."

In *Thomas* v. *Day*[2], a similar question arose. There the plaintiff claimed an account and money due under a partnership which he alleged had existed between himself and the defendant to take an office and carry on a betting business as bookmakers. Darling, J., held that a partnership to carry on the buisness of a bookmaker was not recognized by law, that even if there was such a legal partnership, an action for account would not lie as between the two bookmakers founded on betting and gambling transactions. This judgment certainly supports the appellant ; but the learned Judge did not take notice of the previous decision on the subject and the subsequent decisions have not followed it. When a similar objection was raised in *Brookman* v. *Mather*[3], Avery, J., rejected the plea and gave a decree to the plaintiff. There the plaintiff and the defendant entered into a partnership to carry on a betting business.

1. L.R. (1896) 1 Ch. 496.
2. (1908) 24 T.L.R. 272.
3. (1913) 29 T.L.R. 276.

Two years thereafter, in 1910, the partnership was dissolved and a certain amount was found due to the plaintiff from the defendant and the latter gave the former a promissory note for that amount. A suit was filed for the recovery of the amount payable under the promissory note. Avery, J., reiterated the principle that betting was not illegal *per se*. When the decision in *Thomas* v. *Day*[1] was cited in support of the broad principle that the betting business could not be recognised as legal in a Court of Justice, the learned Judge pointed out that that case was decided without reference to *Thwaites* v. *Coulthwaite*[2]. This Judgment, therefore, corrected the deviation made by Darling, J., in *Thomas* v. *Day*[1], and put the case-law in line with earlier precedents.

The earlier view was again accepted and followed in *Keen* v. *Price*[3] where an action by one of the partners in a bookmakers and betting business against the other for an account of the partnership dealings was entertained. But the Court gave liberty to the defendant to object to repaying anything which represented profits in such business. The reason for this apparent conflict between the two parts of the decision is found in the express terms of the provisions of the Gaming Act of 1892. Commenting upon *Thwaites* v. *Coulthwaite*[2] in which Chitty, J., held that such an action would lie for an account of the profits of the partnership, Sargant, J., pointed out that in that case the Gaming Act, 1892, was not referred to. At page 101, the learned Judge says:

"Curiously enough, in that case the Gaming Act, 1892, was not referred to, and although the decision is a good one on the general law, it cannot be regarded as a decision on the Act of 1892".

This judgment confirms the principle that a wager is not illegal, but states that after the Gaming Act, 1892, a claim in respect of that amount even under a collateral agreement is not maintainable.

In *O'Connor and Ould* v. *Ralston*[4], the plaintiff, a firm of bookmakers, filed a suit claiming from the defendant the amount of five cheques drawn by him upon his bank in payment of bets which he had lost to them and which had been dishonoured on presentation. Darling, J., held that as the plaintiffs formed an association for the purpose of carrying on a betting business, the action would not lie. In coming to that conclusion the learned Judge relied upon the dissenting view of Fletcher Moulton, L.J., in *Hyams* v. *Stuart King*[5]. We shall consider that decision at a later stage.

The opinion of Darling, J., was not accepted in *Jeffrey & Co.* v. *Bamford*[6] wherein McCardie, J., held that a partnership for the purpose of carrying on a betting and bookmakers business is not *per se* illegal or impossible in law. The learned Judge says at page 356:

"...............betting or wagering is not illegal at common law.............

It has been repeatedly pointed out that mere betting on horse-races is not illegal."

The learned Judge, after noticing the earlier decisions already considered by us and also some of the observations of Fletcher Moulton, L.J., came to the conclusion that the partnership was not illegal.

We shall now scrutinize the decision in *Hill* v. *William Hill*[7] to see whether there is any substance in the argument of the learned counsel for the appellant that this decision accepted the dissenting view of Fletcher Moulton, L.J., in *Hyams* v. *Stuart King*[5] or the view of Darling, J., in *Thomas* v. *Day*[1] and *O'Connor and Ould* v. *Ralston*[4]. The facts in that case were: The appellant had betting transactions with the respondents, a firm of bookmakers. As a result of those transactions, the appellant lost £3,635-12-6. As the appellant was unable to pay the amount, the matter was referred to the committee of Tattersalls, who decided that the appellant should pay the respondents a sum of £635-12-6 within fourteen days and the balance by monthly instalments of £100. It was laid down that if the appellant failed to make those payments, he was liable to be reported to the said committee which would

1. (1908) 24 T.L.R. 272.
2. L.R. (1896) 1 Ch. 496.
3. L.R. (1914) 2 Ch. 98.
4. L.R. (1920) 3 K.B. 451.
5. L.R. (1908) 2 K.B. 696.
6. L.R. (1921) 2 K.B. 351.
7. (1949) 2 All E.R. 452.

result in his being warned off Newmarket Heath and posted as defaulter. The appellant informed the respondents that he was unable to pay the £635-12-6 within the prescribed time and offered to send them a cheque for that sum post-dated October 10, 1946, and to pay the monthly instalments of £100 thereafter. On the respondents agreeing to that course, the appellant sent a post-dated cheque to them and also enclosed a letter agreeing to pay the monthly instalments. As the post-dated cheque was dishonoured and the appellant failed to pay the entire amount, the respondents filed a suit claiming the amount due to them under the subsequent agreement. The respondents contended that the sum the appellant had promised to pay was not money won upon a wager within the meaning of the second branch of section 18, but was money due under a new lawful and enforceable agreement and that even if the sum was to be regarded as won on a wager, the agreement was outside the scope of the second branch of section 18 of the Gaming Act, 1845. The House of Lords by a majority of 4 to 3 held that the agreement contained a new promise to pay money won upon a wager and that the second branch of section 18 applied to all suits brought to recover money alleged to have been won on a wager and therefore the contract was unenforceable. In coming to that conclusion, Viscount Simon, one of the Judges who expressed the majority view, agreed with Fletcher Moulton, L.J., in holding that the bond constituted an agreement to pay money won upon a wager, notwithstanding the new consideration, and was thus unenforceable under the second limb of section 18.

In *Hyams* v. *Stuart King*[1], the facts of which we have already given, the suit was filed on the basis of a subsequent agreement between the same parties to the wager. The majority of the Judges held that the subsequent agreement was supported by good consideration, while Fletcher Moulton, L.J., dissented from that view. The basis for the dissenting view is found at page 712. After reading section 18 of the Gaming Act, 1845, the learned Judge proceeded to state :

"In my opinion too little attention has been paid to the distinction between the two parts of this enactment, and the second part has been treated as being in effect merely a repetition of the first part. I cannot accept such an interpretation. So far as the actual wagering contract is concerned, the earlier provision is ample. It makes that contract absolutely void, and it would be idle to enact in addition that no suit should be brought upon a contract that had thus been rendered void by statute. The language of the later provision is in my opinion much wider. It provides with complete generality that no action shall be brought to recover anything alleged to be won upon any wager, without in any way limiting the application of the provision to the wagering contract itself. In other words, it provides that wherever the obligation under a contract is or includes the payment of money won upon a wager, the Courts shall not be used to enforce the performance of that part of the obligation."

These observations must be understood in the context of the peculiar facts of that case. The suit was between the parties to the wager. The question was whether the second part of the concerned section was comprehensive enough to take in an agreement to recover the money won upon a wager within the meaning of that part. Fletcher Moulton, L.J., held that the second part was wide and comprehensive enough to take in such a claim, for the suit was, though on the basis of a substituted agreement, for the recovery of the money won upon a wager within the meaning of the words of that part of the section. The second question considered by the learned Judge was whether the defendants' firm which was an association formed for the purpose of a betting business was a legal partnership under the English Law. The learned Judge relied upon the Gaming Act, 1892, in holding that it was not possible under the English law to have any such partnership. At page 718, the learned Judge observed:

"In my opinion no such partnership is possible under English law. Without considering any other grounds of objection to its existence, the language of the Gaming Act, 1892, appears to me to be sufficient to establish this proposition. It is essential to the idea of a partnership that each partner is an agent of the partnership and (subject to the provisions of the partnership deed) has authority to make payments on its behalf for partnership purposes, for which he is entitled to claim credit in the partnership accounts and thus receive, directly or indirectly, repayment. But by the Gaming Act, 1892, all promises to pay any person any sum of money paid by him in respect of a wagering contract are null and void. These words are wide enough to nullify the fundamental contract which must

1. L.R. (1908) 2 K.B. 696.

be the basis of a partnership, and therefore in my opinion no such partnership is possible, and the action for this reason alone was wrongly framed and should have been dismissed with costs."

It would be seen from the said observations that Fletcher Moulton, L.J., laid down two propositions : (i) The second part of section 18 of the Gaming Act, 1845, was comprehensive enough to take in a claim for the recovery of money alleged to be won upon a wager though the said claim was based upon a substituted contract between the same parties ; and (ii) by reason of the wide terms of the Gaming Act, 1892, even the fundamental contract, which was the basis of a partnership, was itself a nullity. The learned Lord Justice did not purport to express any opinion on the effect of a void contract of wager on a collateral contract. In *Hill's case*[1] the only question that arose was whether the second part of section 18 was a bar to the maintainability of a suit under a substituted agreement for the recovery of money won upon a wager. The majority accepted the view of Fletcher Moulton, L.J., on the first question. The second question did not arise for consideration in that case. The House of Lords neither expressly nor by necessary implication purported to hold that collateral contract of either partnership or agency was illegal ; and that the long catena of decisions already referred to by us were wrongly decided. This judgment does not therefore support the contention of the learned counsel for the appellant.

The legal position in India is not different. Before the Act for Avoiding Wagers, 1848, the law relating to wagers that was in force in British India was the common law of England. The Judicial Committee in *Ramloll Thackoorseydass* v. *Soojumnull Dhondmull*[2] expressly ruled that the common law of England was in force in India and under that law an action might be maintained on a wager. The wager dealt with in that case was upon the average price which opium would fetch at the next Government sale at Calcutta. Lord Campbell in rejecting the plea that the wager was illegal observed at page 349 :

"The Statute, 8 & 9 Vict. c. 109, does not extend to India, and although both parties on the record are Hindoos, no peculiar Hindoo Law is alleged to exist upon the subject; therefore this case must be decided by the common law of England."

It is a direct decision on the point now mooted before us and it is in favour of the respondents. Again the Privy Council considered a similar question in *Doolubdas Pettamberdass* v. *Ramloll Thackoorseydass and others*[3]. There again the wager was upon the price that the Patna opium would fetch at the next Government sale at Calcutta. There the plaintiff instituted a suit in the Supreme Court of Bombay in January, 1847, to recover the money won on a wager. After the suit was filed, Act XXI of 1848 was passed by the Indian Legislature whereunder all agreements whether made in speaking, writing, or otherwise, by way of gaming or wagering, would be null and void and no suit would be allowed in any Court of Law or Equity for recovering any sum of money or valuable thing alleged to be won on any wager. This section was similar in terms to that of section 18 of the Gaming Act, 1845. Their Lordships held that the contract was not void and the Act XXI of 1848 would not invalidate the contracts entered into before the Act came into force. Adverting to the next argument that under Hindu Law such contracts were void, they restated their view expressed in *Ramloll Thackoorseydass* v. *Soojumnull Dhondmull*[2] thus at page 127 :

"Their Lordships have already said that they are not satisfied from the authorities referred to, that such is the law among the Hindus.........."

The Judicial Committee again restated the law in similar terms in *Raghoonauth Sahoi Chotayloll* v. *Manickchund and Kaisreechund*[4]. There the Judicial Committee held that a wagering contract in India upon the average price opium would fetch at a future Government sale, was legal and enforceable before the passing of the Legislative Act No. XXI of 1848.

The aforesaid three decisions of the Privy Council clearly establish the legal position in India before the enactment of the Act XXI of 1848, namely, that wagering contracts were governed by the common law of England and were not void and

1. (1949) 2 All E.R. 452.
2. (1848) 4 M.I.A. 339
3. (1850) 5 M.I.A. 109.
4. (1856) 6 M.I.A. 251.

therefore enforceable in Courts. They also held that the Hindu Law did not prohibit any such wagers.

The same view was expressed by the Indian Courts in cases decided after the enactment of the Contract Act. An agent who paid the amount of betting lost by him was allowed to recover the same from his principal in *Pringle* v. *Jafar Khan*[1]. The reason for that decision is given at page 445 :

> "There was nothing illegal in the contract ; betting at horse-races could not be said to be illegal in the sense of tainting any transaction connected with it. This distinction between an agreement which is only void and one in which the consideration is also unlawful is made in the Contract Act. Section 23 points out in what cases the consideration of an agreement is unlawful, and in such cases the agreement is also void, that is, not enforceable at law. Section 30 refers to cases in which the agreement is only void, though the consideration is not necessarily unlawful. There is no reason why the plaintiff should not recover the sum paid by him............"

In *Shibho Mal* v. *Lachman Das*[2] an agent who paid the losses on the wagering transactions was allowed to recover the amounts he paid from his principal. In *Beni Madho Das* v. *Kaunsal Kishore Dhusar*[3], the plaintiff who lent money to the defendant to enable him to pay off a gambling debt was given a decree to recover the same from the defendant. Where two partners entered into a contract of wager with a third party and one partner had satisfied his own and his co-partner's liability under the contract, the Nagpur High Court, in *Md. Gulam Mustafakhan* v. *Padamsi*[4], held that the partner who paid the amount could legally claim the other partner's share of the loss. The learned Judge reiterated the same principle accepted in the decisions cited *supra*, when he said at page 49 :

> " Section 30 of the Indian Contract Act does not affect agreements or transactions collateral to wagers................"

The said decisions were based upon the well-settled principle that a wagering contract was only void, but not illegal, and therefore a collateral contract could be enforced.

Before closing this branch of the discussion, it may be convenient to consider a subsidiary point raised by the learned counsel for the appellant that though a contract of partnership was not illegal, in the matter of accounting, the loss paid by one of the partners on wagering transactions, could not be taken into consideration. Reliance is placed in support of this contention on Chitty's Contract, page 495, paragraph 908, which reads :

> " Inasmuch as betting is not in itself illegal, the law does not refuse to recognise a partnership formed for the purpose of betting. Upon the dissolution of such a partnership an account may be ordered. Each partner has a right to recover his share of the capital subscribed, so far as it has not been spent ; but he cannot claim an account of profits or repayments of amounts advanced by him which have actually been applied in paying the bets of the partnership."

In support of this view, two decisions are cited. They are : *Thwaites* v. *Coulthwaite*[5] and *Saffery* v. *Mayer*[6]. The first case has already been considered by us. There, Chitty, J., in giving a decree for account left open the question of the legality of certain transactions till it arose on the taking of the account. Far from helping the appellant, the observations and the actual decision in that case support the respondents' contention. The reservation of the question of particular transactions presumably related only to the transactions prohibited by the Betting Act, 1853. Such of the transactions which were so prohibited by the Betting Act would be illegal and therefore the contract of partnership could not operate on such transactions. The case of *Saffery* v. *Mayer*[6] related to a suit for recovery of money advanced by one person to another for the purpose of betting on horses on their joint account. The appellate Court held that by reason of the provisions of the Gaming Act, 1892, the action was not maintainable. This decision clearly turned upon the provisions of the Gaming Act, 1892. Smith, M.R., observed that the plaintiff paid the money to the defendant in respect of a contract rendered null and void and therefore it was

1. (1883) I.L.R. 5 All. 443.
2. (1901) I.L.R. 23 All. 165.
3. (1900) I.L.R. 22 All. 452.
4. A.I.R. 1923 Nag. 48.
5. L.R. (1896) 1 Ch. 496.
6. L.R. (1901) 1 K.B. 11.

not recoverable under the second limb of that section. The other Lord Justices also based their Judgments on the express words of the Gaming Act, 1892. It will be also interesting to note that the Court of Appeal further pointed out that Chitty, J., in *Thwaites' case*[1] in deciding in the way he did omitted to consider the effect of the provisions of the Gaming Act, 1892, on the question of maintainability of the action before him. The aforesaid passage in Chitty's Contract must be understood only in the context of the provisions of the Gaming Act, 1892.

The aforesaid discussion yields the following results : (1) Under the common law of England a contract of wager is valid and therefore both the primary contract as well as the collateral agreement in respect thereof are enforceable ; (2) after the enactment of the Gaming Act, 1845, a wager is made void but not illegal in the sense of being forbidden by law, and thereafter a primary agreement of wager is void but a collateral agreement is enforceable ; (3) there was a conflict on the question whether the second part of section 18 of the Gaming Act, 1845, would cover a case for the recovery of money or valuable thing alleged to be won upon any wager under a substituted contract between the same parties : the House of Lords in *Hill's case*[2] had finally resolved the conflict by holding that such a claim was not sustainable whether it was made under the original contract of wager between the parties or under a substituted agreement between them; (4) under the Gaming Act, 1892, in view of its wide and comprehensive phraseology, even collateral contracts, including partnership agreements, are not enforceable ; (5) section 30 of the Indian Contract Act is based upon the provisions of section 18 of the Gaming Act, 1845, and though a wager is void and unenforceable, it is not forbidden by law and therefore the object of a collateral agreement is not unlawful under section 23 of the Contract Act ; and (6) partnership being an agreement within the meaning of section 23 of the Indian Contract Act, it is not unlawful, though its object is to carry on wagering transactions. We, therefore, hold that in the present case the partnership is not unlawful within the meaning of section 23 of the Contract Act.

Re (ii).—*Public Policy* : The learned counsel for the appellant contends that the concept of public policy is very comprehensive and that in India, particularly after independence, its content should be measured having regard to political, social and economic policies of a welfare State and the traditions of this ancient country reflected in *Srutis*, *Smritis* and *Nibandas*. Before adverting to the argument of the learned counsel, it would be convenient at the outset to ascertain the meaning of this concept and to note how the Courts in England and India have applied it to different situations. Cheshire and Pifoot in their book on "Law of Contract", 3rd Edn., observe, at page 280 thus :

"The public interests which it is designed to protect are so comprehensive and heterogeneous, and opinions as to what is injurious must of necessity vary so greatly with the social and moral convictions, and at times even with the political views, of different Judges, that it forms a treacherous and unstable ground for legal decision............These questions have agitated the Courts in the past, but the present state of the law would appear to be reasonably clear. Two observations may be made with some degree of assurance.

First, although the rules already established by precedent must be moulded to fit the new conditions of a changing world, it is no longer legitimate for the Courts to invent a new head of public policy. A Judge is not free to speculate upon what, in his opinion, is for the good of the community. He must be content to apply, either directly or by way of analogy, the principles laid down in previous decisions. He must expound, not expand, this particular branch of the law.

Secondly, even though the contract is one which *prima facie* falls under one of the recognized heads of public policy, it will not be held illegal unless its harmful qualities are indisputable. The doctrine, as Lord Atkin remarked in a leading case, 'should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds........In popular language....the contract should be given the benefit of the doubt' ".

Anson in his 'Law of Contract' states the same rule thus, at page 216 :

"Jessel, M.R., in 1875, stated a principle which is still valid for the Courts when he said: 'You have this paramount public policy to consider, that you are not lightly to interfere with the freedom of contract' ; and it is in reconciling freedom of contract with other public interests which are regarded as of not less importance that the difficulty in these cases arises........

1. L.R. (1896) 1 Ch. 496. 2. (1949) 2 All E.R. 452.

We may say, however, that the policy of the law has, on certain subjects, been worked into a set of tolerably definite rules. The application of these to particular instances necessarily varies with the conditions of the times and the progressive development of public opinion and morality, but, as Lord Wright has said, 'public policy, like any other branch of the Common Law, ought to be, and I think is, governed by the judicial use of precedents. If it is said that rules of public policy have to be moulded to suit new conditions of a changing world, that is true; but the same is true of the principles of the Common Law generally."

In Halsbury's Laws of England, 3rd edition, volume 8, the doctrine is stated, at page 130, thus :

" Any agreement which tends to be injurious to the public or against the public good is void as being contrary to public policy............It seems, however, that this branch of the law will not be extended. The determination of what is contrary to the so-called policy of the law necessarily varies from time to time. Many transactions are upheld now which in a former generation would have been avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion."

A few of the leading cases on the subject reflected in the authoritative statements of law by the various authors may also be useful to demarcate the limits of this illusive concept.

Parke, B., in *Egerton* v. *Brownlow*[1], which is a leading judgment on the subject, describes the doctrine of public policy, thus at page 123 :

" ' Public policy ' is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights ; it is capable of being understood in different senses ; it may, and does, in its ordinary sense, mean ' political expedience ', or that which is best for the common good of the community; and in that sense there may be every variety of opinion, according to education, habits, talents, and dispositions of each person, who is to decide whether an act is against public policy or not. To allow this to be a ground of judicial decision, would lead to the greatest uncertainty and confusion. It is the province of the statesman, and not the lawyer, to discuss, and of the Legislature to determine, what is best for the public good, and to provide for it by proper enactments. It is the province of the Judge to expound the law only ; the written from the statutes ; the unwritten or common law from the decisions of our predecessors and of our existing Courts from text-writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is the best, in his opinion, for the advantage of the community. Some of these decisions may have no doubt been founded upon the prevailing and just opinions of the public good; for instance, the illegality of covenants in restraint of marriage or trade. They have become a part of the recognised law, and we are therefore bound by them, but we are not thereby authorised to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise."

In *Janson* v. *Driefontein Consolidated Mines, Ltd.*[2], an action raised against British underwriters in respect of insurance of treasures against capture during its transit from a foreign state to Great Britain was resisted by the underwriters on the ground that the insurance was against public policy. The House of Lords rejected the plea. Earl of Halsbury, L.C., in his speech made weighty observations which may usefully be extracted. The learned Lord says, at page 491 :

" In treating of various branches of the law learned persons have analysed the sources of the law, and have sometimes expressed their opinion that such and such a provision is bad because it is contrary to public policy ; but I deny that any Court can invent a new head of public policy; so a contract for marriage brokerage, the creation of a perpetuity, a contract in restraint of trade, a gaming or wagering contract, or, what is relevant here, the assisting of the King's enemies, are all undoubtedly unlawful things; and you may say that it is because they are contrary to public policy they are unlawful; but it is because these things have been either enacted or assumed to be by the common law unlawful, and not because a Judge or Court have a right to declare that such and such things are in his or their view contrary to public policy. Of course, in the application of the principles here insisted on, it is inevitable that the particular case must be decided by a Judge; he must find the facts, and he must decide whether the facts so found do or do not come within the principles which I have endeavoured to describe—that is, a principle of public policy, recognised by the law which the suggested contract is infringing, or is supposed to infringe."

These observations indicate that the doctrine of public policy is only a branch of common law and unless the principle of public policy is recognized by that law, Court cannot apply it to invalidate a contract. Lord Lindley in his speech at page 507, pointed out that public policy is a very unstable and dangerous foundation on which to build until made safe by decision. A promise made by one spouse,

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1. 4 H.L.C. 1, 123 : 10 E.R. 359, 408. 2. L.R. (1902) A.C. 484.

after a decree *nisi* for the dissolution of the marriage has been pronounced, to marry a third person after the decree has been made absolute is not void as being against public policy : see *Fender* v. *St. John Mildmay*[1]. In that case Lord Atkin states the scope of the doctrine thus, at page 12 :

"In popular language, following the wise aphorism of Sir George Jessel cited above, the contract should be given the benefit of the doubt.

But there is no doubt that the rule exists. In cases where the promise to do something contrary to public policy which for short I will call a harmful thing, or where the consideration for the promise is the doing or the promise to do a harmful thing a Judge, though he is on slippery ground, at any rate has a chance of finding a footing.......But the doctrine does not extend only to harmful acts, it has to be applied to harmful tendencies. Here the ground is still less safe and more treacherous."

Adverting to the observation of Lord Halsbury in *Janson* v. *Driefontein Consolidated Mines, Ltd.*[2], Lord Atkin commented thus, at page 11 :

"............Lord Halsbury indeed appeared to decide that the categories of public policy are closed, and that the principle could not be invoked anew unless the case could be brought within some principle of public policy already recognized by the law. I do not find, however, that this view received the express assent of the other members of the House ; and it seems to me, with respect, too rigid. On the other hand, it fortifies the serious warning illustrated by the passages cited above that the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds."

Lord Thankerton summarised his view in the following terms, at page 23 :

"In the first place, there can be little question as to the proper function of the Courts in questions of public policy. Their duty is to expound, and not to expand, such policy. That does not mean that they are precluded from applying an existing principle of public policy to a new set of circumstances, where such circumstances are clearly within the scope of the policy. Such a case might well arise in the case of safety of the State, for instance. But no such case is suggested here. Further the Courts must be watchful not to be influenced by their view of what the principle of public policy or its limits, should be."

Lord Wright, at page 38, explains the two senses in which the words "public policy" are used :

"In one sense every rule of law, either common law or equity, which has been laid down by the Courts, in that course of judicial legislation which has evolved the law of this country, has been based on considerations of public interest or policy. In that sense Sir George Jessel, M. R., referred to the paramount public policy that people should fufil their contracts. But public policy in the narrower sense means that there are considerations of public interest which require the Courts to depart from their primary function of enforcing contracts, and exceptionally to refuse to enforce them. Public policy in this sense is disabling."

Then the noble Lord proceeds to lay down the following principles on which a Judge should exercise this peculiar and exceptional jurisdiction : (1) It is clear that public policy is not a branch of law to be extended; (2) it is the province of the Judge to expound the law only ; (3) public policy, like any other branch of the common law, is governed by the judicial use of precedents ; and (4) Courts apply some recognised principles to the new conditions, proceeding by way of analogy and according to logic and convenience, just as Courts deal with any other rule of the common law. The learned Lord on the basis of the discussion of case-law on the subject observes, at page 40 :

"It is true that it has been observed that certain rules of public policy have to be moulded to suit new conditions of a changing world : but that is true of the principles of common law generally. I find it difficult to conceive that in these days any new head of public policy could be discovered."

The observations of the aforesaid Law Lords define the concept of public policy and lay down the limits of its application in the modern times. In short, they state that the rules of public policy are well-settled and the function of the Courts is only to expound them and apply them to varying situations. While Lord Atkin does not

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1. L.R. (1938) A.C. 1.

2. L.R. (1902) A.C. 484.

accept Lord Halsbury's dictum that the categories of public policy are closed, he gives a warning that the doctrine should be invoked only in clear cases in which the harm to the public is substantially incontestable, Lord Thankerton and Lord Wright seem to suggest that the categories of public policy are well-settled and what the Courts at best can do is only to apply the same to new set of circumstances. Neither of them excludes the possibility of evolving a new head of public policy in a changing world, but they could not conceive that under the existing circumstances any such head could be discovered.

Asquith, L.J., in *Monkland* v. *Jack Barclay Ltd.*[1], restated the law crisply, at page 723 :

> "The Courts have again and again said, that where a contract does not fit into one or other of these pigeon-holes but lies outside this charmed circle, the Courts should use *extreme reserve* in holding a contract to be void as against public policy, and should only do so when the contract is incontestably and on any view inimical to the public interest."

The Indian cases also adopt the same view. A division bench of the Bombay High Court in *Shrinivas Das Lakshminarayan* v. *Ram Chandra Ramrattandas*[2] observed at page 20 :

> "It is no doubt open to the Court to hold that the consideration or object of an agreement is unlawful on the ground that it is opposed to what the Court regards as public policy. This is laid down n section 23 of the Indian Contract Act and in India therefore it cannot be affirmed as a matter of law as was affirmed by Lord Halsbury in *Janson* v. *Driefontein Consolidated Mines, Limited*[3], that no Court can invent a new head of public policy, but the dictum of Lord Davey in the same case that "public policy is always an unsafe and treacherous ground for legal decision" may be accepted as a sound cautionary maxim in considering the reasons assigned by the learned Judge for his decision."

The same view is confirmed in *Bhagwant Genuji Girme* v. *Gangabisan Ramgopal*[4] and *Gopi Tihadi* v. *Gokhei Panda*[5]. The doctrine of public policy may be summarized thus : Public policy or the policy of the law is an illusive concept ; it has been described as "untrustworthy guide", "variable quality", "uncertain one", "unruly horse", etc.; the primary duty of a Court of Law is to enforce a promise which the parties have made and to uphold the sanctity of contracts which form the basis of society, but in certain cases, the Court may relieve them of their duty on a rule founded on what is called the public policy ; for want of better words Lord Atkin describes that something done contrary to public policy is a harmful thing, but the doctrine is extended not only to harmful cases but also to harmful tendencies ; the doctrine of public policy is only a branch of common law, and just like any other branch of common law, it is governed by precedents ; the principles have been crystallized under different heads and though it is permissible for Courts to expound and apply them to different situations, it should only be invoked in clear and incontestable cases of harm to the public ; though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is advisable in the interest of stability of society not to make any attempt to discover new heads in these days.

This leads us to the question whether in England or in India a definite principle of public policy has been evolved or recognized invalidating wagers. So far as England is concerned, the passages from text-books extracted and the decisions discussed in connection with the first point clearly establish that there has never been such a rule of public policy in that country. Courts under the common law of England till the year 1845 enforced such contracts even between parties to the transaction. They held that wagers were not illegal. After the passing of the English Gaming Act, 1845 (8 & 9 Vict. c. 109) such contracts were declared void. Even so, the Courts held that though a wagering contract was void, it was not illegal and therefore an agreement collateral to the wagering contract could be enforced. Only after the enactment of the Gaming Act, 1892 (55 Vict. c. 9) the collateral contracts also became unenforceable by reason of the express words of that Act. Indeed,

1. (1951) 1 All E.R. 714.
2. (1920) I.L.R. 44 Bom. 6.
3. L.R. (1902) A.C. 484 at 491.
4. (1941) I.L.R. Bom. 71.
5. I.L.R. (1953) Cut. 558.

in some of the decisions cited supra the question of public policy was specifically raised and negatived by Courts. See *Thacker* v. *Hardy*[1], *Hyams* v. *Stuart King*[2] and *Michael Jeffrey & Company* v. *Bamford*[3]. It is therefore abundantly clear that the common law of England did not recognize any principle of public policy declaring wagering contracts illegal.

The legal position is the same in Indian. The India Courts, both before and after the passing of the Act XXI of 1848 and also after the enactment of the Contract Act, have held that the wagering contracts are not illegal and the collateral contracts in respect of them are enforceable. We have already referred to these in dealing with the first point and we need not cover the ground once again, except to cite a passage from the decision of the Judicial Committee in *Ramloll Thackoorseydass* v. *Soojunmull Dhondmull*[4], which is directly in point. Their Lordships in considering the applicability of the doctrine of public policy to a wagering contract observed at page 350:

> "We are of opinion, that, although, to a certain degree, it might create a temptation to do what was wrong, we are not to presume that the parties would commit a crime ; and as it did not interfere with the performance of any duty, and as if the parties were not induced by it to commit a crime, neither the interests of individuals or of the Government could be affected by it, we cannot say that it is contrary to public policy."

There is not a single decision after the above cited case, which was decided in 1846, up to the present day wherein the Courts either declared wagering contracts as illegal or refused to enforce any collateral contract in respect of such wagers, on the ground of public policy. It may, therefore, be stated without any contradiction that the common law of England in respect of wagers was followed in India and it has always been held that such contracts, though void after the Act of 1848, were not illegal. Nor the legislatures of the States excepting Bombay made any attempt to bring the law in India in line with that obtaining in England after the Gaming Act, 1892. The Contract Act was passed in the year 1872. At the time of the passing of the Contract Act, there was a Central Act, Act XXI of 1848, principally based on the English Gaming Act, 1845. There was also the Bombay Wagers (Amendment) Act, 1865, amending the former Act in terms analogous to those later enacted by the Gaming Act, 1892. Though the Contract Act repealed the Act XXI of 1848, it did not incorporate in it the provisions similar to those of the Bombay Act; nor was any amendment made subsequent to the passing of the English Gaming Act, 1892. The legislature must be deemed to have had the knowledge of the state of law in England, and, therefore, we may assume that it did not think fit to make wagers illegal or to hit at collateral contracts. The policy of law in India has therefore been to sustain the legality of wagers.

The history of the law of gambling in India would also show that though gaming in certain respects was controlled, it has never been absolutely prohibited. The following are some of the Gambling Acts in India: The Public Gambling Act (III of 1867) ; The Bengal Public Gambling Act (II of 1867) ; The Bombay Prevention of Gambling Act (IV of 1887) ; Madhya Bharat Gambling Act (LI of 1949) ; Madhya Pradesh Public Gambling Act ; Madras Gambling Act (III of 1930) ; The Orissa Prevention of Gambling Act (XVII of 1955) ; the Punjab Public Gambling Act (III of 1867) ; the Rajasthan Public Gambling Ordinance (Ordinance XLVIII of 1949) and the U.P. Public Gambling Act. These Acts do not prohibit gaming in its entirety, but aim at suppressing gaming in private houses when carried on for profit or gain of the owner or occupier thereof and also gaming in public. Gaming without contravening the provisions of the said Acts is legal. Wherever the State intended to declare a particular form of gaming illegal, it made an express statute to that effect : See section 29-A of the Indian Penal Code. In other respects, gaming and wagering are allowed in India. It is also common knowledge that horse races are allowed throughout India and the State also derives revenue therefrom.

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1. L.R. (1878) 4 Q.B. 685.
2. L.R. (1908) 2 K.B. 696.
3. L.R. (1921) 2 K.B. 351.
4. (1848) 4 M.I.A. 339.

The next question posed by the learned counsel for the appellant is whether under the Hindu Law it can be said that gambling contracts are held to be illegal. The learned counsel relies upon the observations of this Court in *The State of Bombay* v. *R.M.D. Chamarbaugwala*[1]. The question raised in that case was whether the Bombay Lotteries and Prize Competition Control and Tax (Amendment) Act of 1952 extending the definition of "prize competition" contained in section 2 (1) (*d*) of the Bombay Lotteries and Prize Competition Control and Tax Act of 1948, so as to include prize competition carried on through newspapers printed and published outside the State, was constitutionally valid. It was contended, *inter alia*, that the Act offended the fundamental right of the respondents, who were conducting prize competitions, under Article 19 (1) (*g*) of the Constitution and also violated the freedom of inter-State trade under Article 301 thereof. This Court held that the gambling activities in their very nature and essence were extra-commercium and could not either be trade or commerce within the meaning of the aforesaid provisions and therefore neither the fundamental right of the respondents under Article 19 (1) (*g*) or their rights to freedom of inter-State trade under Article 301 is violated. In that context Das, C. J., has collected all the Hindu Law texts from Rig Veda, Mahabharata, Manu, Brihaspati, Yagnavalkya, etc., at pp. 922-923. It is unnecessary to restate them here, but it is clear from those tetxts that Hindu sacred books condemned gambling in unambiguous terms. But the question is whether those ancient text-books remain only as pious wishes of our ancestors or whether they were enforced in the recent centuries. All the branches of the Hindu Law have not been administered by Courts in India ; only questions regarding succession, inheritance, marriage, and religious usages and institutions are decided according to the Hindu Law, except in so far as such law has been altered by legislative enactment. Besides the matters above referred to, there are certain additional matters to which the Hindu Law is applied to the Hindus in some cases by virtue of express legislation and in others on the principle of justice, equity and good conscience. These matters are adoption, guardianship, family relations, wills, gifts and partition. As to these matters also the Hindu Law is to be applied subject to such alterations as have been made by legislative enactments. See Mulla's Hindu Law, para. 3, page 2. In other respects the ancient Hindu Law was not enforced in Indian Courts and it may be said that they became obsolete. Admittedly there has not been a single instance in recorded cases holding gambling or wagering contracts illegal on the ground that they are contrary to public policy as they offended the principles of ancient Hindu Law. In the circumstances, we find it difficult to import the tenents of Hindu Law to give a novel content to the doctrine of public policy in respect of contracts of gaming and wagering.

To summarize : The common law of England and that of India have never struck down contracts of wager on the ground of public policy ; indeed they have always been held to be not illegal nowithstanding the fact that the statute declared them void. Even after the contracts of wager were declared to be void in England, collateral contracts were enforced till the passing of the Gaming Act of 1892, and in India, except in the State of Bombay, they have been enforced even after the passing of the Act XXI of 1848, which was substituted by section 30 of the Contract Act. The moral prohibitions in Hindu Law texts against gambling were not only not legally enforced but were allowed to fall into desuetude. In practice, though gambling is controlled in specific matters, it has not been declared illegal and there is no law declaring wagering illegal. Indeed, some of the gambling practices are a perennial source of income to the State. In the circumstances it is not possible to hold that there is any definite head or principle of public policy evolved by Courts or laid down by precedents which would directly apply to wagering contracts. Even if it is permissible for Courts to evolve a new head of public policy under extraordinary circumstances giving rise to incontestable harm to the society, we cannot say that wager is one of such instances of exceptional gravity , for it has been recognized for centuries and has been tolerated by the public and the state alike. If it has any such

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1. (1957) S.C.J. 607 : (1957) 2 M.L.J. M.L.J. (Crl.) 558 ; (1957) S.C.R. 874. (S.C.) 87 : (1957) 2 An.W.R. (S.C.) 87 : (1957)

tendency, it is for the legislature to make a law prohibiting such contracts and declaring them illegal and not for this Court to resort to judicial legislation.

Re. *Point* (iii)—*Immorality.*—The argument under this head is rather broadly stated by the learned counsel for the appellant. The learned counsel attempts to draw an analogy from the Hindu Law relating to the doctrine of pious obligation of sons to discharge their father's debts and contends that what the Hindu Law considers to be immoral in that context may appropriately be applied to a case under section 23 of the Contract Act. Neither any authority is cited nor any legal basis is suggested for importing the doctrine of Hindu Law into the domain of contracts. Section 23 of the Contract Act is inspired by the common law of England and it would be more useful to refer to the English Law than to the Hindu Law texts dealing with a different matter. Anson in his Law of Contracts states at page 222 thus :

> "The only aspect of immorality with which Courts of Law have dealt is sexual immorality . . . ."

Halsbury in his Laws of England, 3rd Edn., Vol. 8, makes a similar statement, at page 138 :

> "A contract which is made upon an immoral consideration or for an immoral purpose is unenforceable, and there is no distinction in this respect between immoral and illegal contracts. The immorality here alluded to is sexual immorality."

In the Law of Contract by Cheshire and Pifoot, 3rd Edn., it is stated at page 279 :

> "Although Lord Mansfield laid it down that a contract *contra bonos mores* is illegal, the law in this connection gives no extended meaning to morality, but concerns itself only with what is sexually reprehensible."

In the book on the Indian Contract Act by Pollock and Mulla it is stated at page 157 :

> "The epithet 'immoral' points, in legal usage, to conduct or purposes which the State, though disapproving them, is unable, or not advised, to visit with direct punishment."

The learned authors confined its operation to acts which are considered to be immoral according to the standards of immorality approved by Courts. The case-law both in England and India confines the operation of the doctrine to sexal immorality. To cite only some instances ; settlements in consideration of concubinage, contracts of sale or hire of things to be used in a brothel or by a prostitute for purposes incidental to her profession, agreements to pay money for future illicit cohabitation, promises in regard to marriage for consideration, or contracts facilitating divorce are all held to be void on the ground that the object is immoral.

The word "immoral" is a very comprehensive word. Ordinarily it takes in every aspect of personal conduct deviating from the standard norms of life. It may also be said that what is repugnant to good conscience is immoral. Its varying content depends upon time, place and the stage of civilisation of a particular society. In short, no universal standard can be laid down and any law based on such fluid concept defeats its own purpose. The provisions of section 23 of the Contract Act indicate the legislative intention to give it a restricted meaning. Its juxtaposition with an equally illusive concept, public policy, indicates that it is used in a restricted sense; otherwise there would be overlapping of the two concepts. In its wide sense what is immoral may be against public policy, for public policy covers political, social and economic ground of objection. Decided cases and authoritative text-book writers, therefore, confined it, with every justification, only to sexual immorality. The other limitation imposed on the word by the statute, namely, "Courts consider immoral", brings out the idea that it is also a branch of the common law like the doctrine of public policy and, therefore, should be confined to the principles recognized and settled by Courts. Precedents confine the said concept only to sexual immorality and no case has been brought to our notice where it has been applied to any head other than sexual immorality. In the circumstances, we cannot evolve a new head so as to bring in wagers within its fold.

Lastly it is contended by the learned counsel for the appellant that wager is extra-commercium and therefore there cannot be in law partnership for wager within the meaning of section 4 of the Partnership Act; for partnership under that section is relationship between persons who have agreed to share the profits of a business. Reliance is placed in respect of this contention on the decision of this Court in *The State of Bombay* v. *R. M. D. Chamarbaugwala*[1]. This question was not raised in the pleadings. No issue was framed in respect of it. No such case was argued before the learned Subordinate Judge or in the High Court; nor was this point raised in the application for certificate for leave to appeal to the Supreme Court filed in the High Court. Indeed, the learned advocate appearing for the appellant in the High Court stated that his client intended to raise one question only, namely, whether the partnership formed for the purpose of carrying on a business in differences was illegal within the meaning of section 23 of the Contract Act. Further this plea was not specifically disclosed in the statement of case filed by the appellant in this Court. If this contention had been raised at the earliest point of time, it would have been open to the respondents to ask for a suitable amendment of the plaint to sustain their claim. In the circumstances, we do not think that we could with justification allow the appellant to raise this new plea for the first time before us, as it would cause irreparable prejudice to the respondents. We express no opinion on this point.

For the foregoing reasons we must hold that the suit partnership was not unlawful within the meaning of section 23 of the Indian Contract Act.

In the result, the appeal fails and is dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:— B. P. SINHA, J. L. KAPUR AND M. HIDAYATULLAH, JJ.

Ram Dial .. *Appellaut**

v.

Sant Lal and others .. *Respondents.*

Representation of the People Act (XLIII of 1951), *section* 123 (2)—*Scope—Undue influence—Religious leader issuing farman to his followers to vote for particular candidate—If election rendered void.*

A religious leader has a right to exercise his influence in favour of any particular candidate by voting for him and by canvassing votes of others for him. He has a right to express his opinion on the individual merits of the candidates. Such a course of conduct on his part, will only be a use of his great influence amongst a particular section of the voters in the constituency; but it will amount to an abuse of his great influence if the words he uses in a document, or utters in his speeches, leave no choice to the persons addressed by him, in the exercise of their electoral rights. If the religious head had said that he preferred one candidate to the other candidate, because, in his opinion, he was more worthy of the confidence of the electors for certain reasons good, bad or indifferent, and addressed words to that effect to persons who were amenable to his influence, he would be within his rights, and his influence however great, could not be said to have been misused.

But where, as in the instant case, the religious leader practically left no free choice to (his followers) electors, not only by issuing a *hukum* or *farman* but also by his speeches, to the effect that they must vote for a particular candidate, implying that disobedience of his mandate would carry divine displeasure or spiritual censure the case is clearly brought within the purview of the second paragraph of the *Proviso* to section 123 (2) of the Representation of the People Act, 1951.

Appeal from the Judgment and Order, dated the 25th November, 1958, of the Punjab High Court in F.A.O. No. 173 of 1958.

A. V. Viswanatha Sastri, Senior Advocate (*Naunit Lal,* Advocate, with him) for Appellant.

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1. (1957) S.C.J. 607: (1957) 2 M.L.J. (S.C.) 87: (1957) 2 An.W.R. (S.C.) 87: 1957 M.L.J. (Cr.) 558: 1957 S.C.R. 874.

* C.A. No. 108 of 1959. 23rd April, 1959.

M. C. Setalvad, Attorney-General for India (*V. A. Syed Mohammud* and *M. K. Ramamurthi,* Advocates, with him), for Respondent No. 1.

R. H. Dhebar, Advocate, for Respondent No. 3.

The Judgment of the Court was delivered by

Sinha, J.—When the hearing of the appeal had been concluded on March 18, 1959, we had informed the parties, as also the counsel for the Election Commission of India, that the appeal is dismissed with costs, and that the reasons would follow. We now proceed to give our reasons.

This is an appeal on a certificate of fitness granted by the High Court of Judicature for the State of Punjab at Chandigarh, against the judgment and order, dated November 25, 1958, of that Court, dismissing an appeal against the order of the Election Tribunal, Hissar, dated September 14, 1958, setting aside the appellant's election to the Punjab Legislative Assembly. The appellant was the successful candidate from the general seat which was a double-member constituency of Sirsa, the other successful candidate being a Harijan candidate—respondent No. 2 in this Court. The first respondent contested the general seat. The Election Commission of India was added as the third respondent by an order of this Court, dated February 27, 1959, when this Court was moved in the stay matter. This Court directed the case itself to be heard before the date fixed for the fresh election as a result of the order of the Election Tribunal.

It appears that for the double-member constituency of Sirsa, there were a large number of candidates. One of the two seats was reserved for members of the scheduled castes. After the usual withdrawals, sixteen candidates were left in the field to contest the two seats, eight candidates being for the general seat, and the other eight, for the reserved seat. We are not here concerned with the seat reserved for members of the scheduled castes. In respect of the general constituency, the appellant secured 27,272 votes, whereas the first respondent secured 23,329, as a result of the election which took place on March 12 and 14, 1957. The result of the election was declared on March 17, 1957.

The first respondent filed an election petition on April 28, 1957, challenging the election of the appellant. The election was challenged on a large number of grounds—practically exhausting all available grounds under the election law—but as a result of the findings of the Election Tribunal and of the High Court, we are only concerned with the allegations relating to "corrupt practices", contained in sub-paras. (i) to (iii) of para. 13-B of the election petition, which formed the basis for issue No. 4. The relevant allegations may be stated *in extenso* in the words of the election petition, as under:—

"(B) The respondent No. 1 himself, his agents and other persons with the consent of the respondent No. 1 and his agents have committed the corrupt practice of undue influence by interferings directly or indirectly with the free exercise of the electoral right of the electors of this constituency. The known details of these corrupt practices are given in the various clauses under the sub-paragraph :—

(i) Sat Guru Maharaj Partap Singh of Jiwan Nagar, the religious head of Namdharis secs of the Sikhs had some personal grievances against Shri Devi Lal of Chautala a prominent Congrest Leader of the constituency, and the chief supporter of the petitioner at this election. Respondent No. 1 fully knowing of this grievance of the Sat Guru approached him and through him also approached Maharaj Charan Singh of Sikanderpur the religious head of the Radha Swami Samaj and got issued Farmans (orders) by both these religious heads to their followers in this constituency to the effect that their Dharma required them to whole-heartedly support respondent No. 1 and to oppose the candidature of the petitioner and that if any of the followers dared to act against their Farmans, thewrath of the aforementioned Gurus would fall upon him and he would be the object of Divine displeasure. These Farmans of the two Gurus were orally conveyed, through the 'Subas' of Namdharis, Shri Bir Singh the son of Sat Guru Partap Singh and Naginder Singh and Shri Parshotam Singh followers of Guru Charan Singh, throughout the Constituency wherever the followers of these two sects resided from the day of withdrawal till the polling began, during their canvassing tours for respondent No. 1, Shri Bir Singh, Parshotam Singh and Naginder Singh aforesaid and Sant Teja Singh M.L.C., in

Diwans held in the various villages and towns of the Constituency during their canvasisng tour, besides repeating these 'Farmans' of the two Gurus also threatened the followers with expulsion from the sect and Samaj if they went against the wish of the Gurus in this matter.

(ii) That Sat Guru Partap Singh himself in the presence of respondent No. 1 in the Big-Diwan of his followers held on the 26th of February, 1957, at Sirsa in Radha Swami Sat-Sangh Hall, preached and commanded all those present that it was the primary Dharma of all his followers to help the candidature of respondent No. 1 and to oppose the petitioner with all their might by giving their own votes and by canvassing among their area of influence in the constituency. The Sat Guru him self held Diwans at villages Tharaj on the 6th of March, 1957, at village Bhiwan on the 5th March, 1957, at village Rori on the 6th March, 1957 and at Phaggu on the 6th March, 1957. In these Diwans he besides repeating his Farmans aforesaid also relied upon the strong appeal of his relationship, he being the son of the daughter of village Tharaj. A very big diwan of his followers also held at Khairpur on the 26th February, 1957, for the same purpose where the Sat Guru himself commanded his followers in the like tune.

(iii) That respondent No. 1 got issued posters in thousands printed on both the sides in Hindi and Gurmukhi scripts on the 26th of February, 1957, containing the orders 'Farmans' of Satguru Partap Singh under the signature of Shri Maharaj Bir Singh son of Satguru Partap Singh. These posters were got published at the instance of respondent No. 1 at Bansal Press, Hissaria Bazar, Sirsa. These posters contained in verbatim the orders 'Farmans' of the Satguru to the effect that it was the primary Dharma of every Namdhari of this constituency to give his own vote as well as to canvass votes of all their acquaintances for Shri Ram Dayal candidate respondent No. 1. A copy of the poster in original together with its English translation is attached with the petition and may be read as to form its part. These posters were distributed throughout the constituency after the same were got printed till the polling day in all the villages where Namdharis reside."

In support of all his allegations quoted above, the first respondent adduced a large volume of oral evidence, besides some documentary evidence as well. The Tribunal came to the conclusion that Maharaj Partap Singh had issued *farmans* to his *satsanghis* that he, who will not vote for the appellant, would suffer not only in this world but in the next also, but it found it not proved that the *farmans* or orders of the two religious heads of the Namdharis and Radhaswamis, were orally conveyed through Maharaj Bir Singh, son of Maharaj Partap Singh, Naginder Singh and Shri Purshotam Singh, to the followers of the two *Gurus* in the constituency, or that they, while conveying the *farmans* of the *Gurus,* threatened the followers with expulsion from the sect, if they went against the wishes of the *Gurus,* except what Naginder Singh had said in the *Diwan* at Sirsa and at other places. It also recorded the finding that the *Diwans* were held for the purpose of canvassing in favour of the appellant at the time and place mentioned in the petition, and that those *Diwans* were addressed by Maharaj Partap Singh and others. It was also found that Maharaj Partap Singh actively supported the candidature of the appellant, and addressed his followers on the basis of religion and asked them to vote for the appellant, and that all this was done at the instance and in the presence of the appellant. It was further found that posters, like Exh. P. 1, were issued by the appellant under the authority of Maharaj Bir Singh and his father, Maharaj Partap Singh, and widely distributed throughout the constituency. The Tribunal also discussed the question as to whether, on those findings, the provisions of section 123 (2) of the Representation of the People Act, 1951 (which will hereinafter be referred to as 'the Act'), relating to "undue influence", could be said to have been satisfied; and alternatively, whether those findings would bring the case within the provisions of clause (3) of section 123 of the Act, relating to systematic appeal on grounds of caste, race, community or religion, etc. The Tribunal appeared to be inclined to the view that a command in terms of Exh. P. 1, emanating from a religious head, like the Sat Guru, to his followers—mostly illiterate and ignorant persons—may well be construed as "undue influence". But alternatively, it also held that even if the provisions of clause (2) of section 123 of the Act, had not been satisfied, the case had been brought well within the purview of clause (3) of section 123. Other issues were either not pressed or were decided against the petitioner in that Court. The Tribunal, therefore, declared the appellant's election void under section 100 (1) (*b*) of the Act. In view of the fact that the petitioner had

failed to substantiate many of his allegations, the Tribunal directed the parties to bear their own costs.

The appellant preferred an appeal which was heard by a Division Bench (Falshaw and Dua, JJ.) of the High Court of Judicature for the State of Punjab at Chandigarh. The High Court substantially affirmed the findings of the Election Tribunal on issue No. 4 aforesaid. The High Court also accepted the oral evidence adduced on behalf of the respondent, with particular reference to the publication and wide distribution of the poster, Exh. P. 1. In the course of its judgment, the High Court observed:

"The language of the mandate and the general background and circumstances of this case including the obvious consciousness of Mahraj Partap Singh and Ram Dial of the probable and likely effect of such commands on the illiterate, ignorant and credulous followers of the Maharaj can lead but to one conclusion that it was intended to convey to them the threat of divine displeasure and spiritual censure if they dared to disobey the *farman* of their supreme spiritual and religious head."

In answer to the contention that the *farman* had been motivated not by religious considerations but by a personal grievance, the High Court did not attach any importance to the alleged difference in the motive, and observed:

"If the influence exercised by the religious and spiritual head has the effect of creating in the minds of the voters a feeling of divine disapleasure or spiritual censure then whatever the motive, the influence would amount to undue influence. The contents of the poster reproduced earlier unequivocally establish the mandatory nature of the command. Religious sanction is, in my opinion, implicit in it and I think, on a reasonable construction of its contents, it must be held that Maharaj Partap Singh intended to convey to his followers who are mostly illiterate, ignorant, credulous and and unsophisticated villagers, having blind and implict faith in their religious head that if they did not vote for Ram Dial, they would incur divine displeasure and spiritual censure. With this class of villagers the displeasure of the religious head is usually associated with divine displeasure."

Dealing with the scope of section 123 (2), it held that the language of the poster, Exh. P. 1, construed in the light of the oral evidence, left the Court in no doubt that Maharaj Partap Singh's *farman* did necessarily imply divine displeasure and spiritual censure for those who chose to disobey the *farman*. In its view, therefore, the facts, as found, attracted the provisions of section 123 (2) of the Act. It also held that the evidence led in the case, established that the meetings addressed by Maharaj Partap Singh and others, in support of the election of the appellant, induced the belief that the voters would incur divine displeasure or spiritual censure if they did not vote in accordance with the mandate issued by the Maharaj, thus, clearly establishing the commission of corrupt practice of "undue influence". The High Court also examined the question whether the corrupt practice falling under clause (3) of section 123 of the Act, had been established, and decided the question in the negative, though not without some hesitation. It further held that the publication of the poster, Exh. P. 2, did not bring the case within the purview of section 123 (4) of the Act. In the result, the High Court agreed with the conclusion of the Tribunal, declaring the election void, and dismissed the appeal with costs. The appellant applied to the High Court, praying for the necessary certificate that the case was a fit one for appeal to this Court, and that Court granted the certificate. Hence, this appeal.

After the decision of the Tribunal and of the High Court, the only question for determination in this appeal, is whether, on the findings of fact recorded, as stated above, the corrupt practice of "undue influence", as defined in section 123 (2), has been made out. It has been argued on behalf of the appellant that the main clause (2) of section 123, is out of the way of the parties in this case, because it applies only to threats of injury to person or property and not to what may be termed "spiritual undue influence", which is specifically covered by sub-clause (ii) of *proviso* (a) to clause (2) of section 123. It was further argued that the word "deemed" would show that the *proviso* is by way of an addition to the main provision of clause (2) of section 123; that is to say, what was not actually covered by the main clause (2), has been added to the ambit of the defi-

nition by the *proviso*. It has further been argued that clause (2) is directed against unduly influencing *individual* voters, and reliance was placed upon the cases of *Cheltenham*[1], *Nottingham*[2] and *North Durham*[3]. Reference was also made to the observations in *"Rogers on Election"*[4], and it was argued that an electoral right, as defined in section 79 (*d*) of the Act, is a personal individual right, including the right to vote or to refrain from voting at an election. Hence, there should have been pleading by the petitioner and finding by the Court on evidence that certain named individuals had been subjected to the corrupt practice of undue influence. Secondly, in the absence of any such pleading or finding, a general allegation of the corrupt practice of undue influence, without reference to individuals, is not enough in law to vitiate an election.

The corrupt practice of undue influence has been defined in clause (2) of section 123 of the Act, in these terms:—

"(2) Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of the candidate or his agent, or of any other person, with the consent of a candidate or his election agent, with the free exercise of any electoral right :

Provided that—

(*a*) without prejudice to the generality of the provisions of this clause any such person as is referred to therein who—

(i) threatens any candidate, or any elector, or any person in whom a candidate or an elector is interested, with injury of any kind including social ostracism and excommunication or expulsion from any caste or community ; or

(ii) induces or attempts to induce a candidate or an elector to believe that he, or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure,

shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of this clause ;

(*b*) a declaration of public policy or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this clause."

It should be observed, at the outset, that the law in England, relating to undue influence at elections, is not the same as the law in India, as will appear from the following definition of "undue influence" contained in section 2 of 46 & 47 Vict. c. 51, which substantially re-enacted the former section 5 of 17 & 18 Vict. c. 102:—

"Every person who shall directly or indirectly, by himself or by any other person on his behalf make use of or threaten to make use of any force, violence, or restraint, or inflict or threaten to inflict, by himself or by any other person, any temporal or spiritual injury, damage, harm, or loss upon or against any person in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrained from voting at any election, or who shall by abduction, duress, or any fraudulent device or contrivance, impede or prevent the free exercise of the franchise of any elector, or shall thereby compel, induce, or prevail upon any elector either to give or to refrain from giving his vote at any election, shall be guilty of undue influence."

The words of the English statute, quoted above lays emphasis upon the individual aspect of the exercise of undue influence. It was with reference to the words of that statute, that Bramwell, B., made the following observations in *North Durham*[3].

"When the language of the Act is examined it will be found that intimidation to be within the statute must be intimidation practised upon an individual."

The Indian law, on the other hand, does not emphasize the individual aspect of the exercise of such influence, but pays regard to the use of such influence as has

1. (1869) 1 O'M & H. 62, 64.
2. (1869) 1 O'M. & H. 245, 246.
3. (1874) 2 O'M. & H. 152, 156.
4. Vol. II, 20th Ed., p. 329.

the tendency to bring about the result contemplated in the clause. What is material under the Indian law, is not the actual effect produced, but the doing of such acts as are calculated to interfere with the free exercise of any electoral right. Decisions of the English Courts, based on the words of the English statute which are not strictly *in pari materia* with the words of the Indian statute, cannot, therefore, be used as precedents in this country.

In the present case, we are not concerned with the threat of temporal injury, damage or harm. On the pleadings and on the findings of the Tribunal and of the High Court, we are concerned with the undue exercise of spiritual influence which has been found by the High Court to have been such a potent influence as to induce in the electors the belief that they will be rendered objects of divine displeasure or spiritual censure if they did not carry out the command of their spiritual head. It was argued that Exhibit P-1, on which so much stress was laid by the Tribunal and by the High Court, did not contain any such direct threat as would bring the case within the second paragraph of *proviso* (a) to section 123 (2). Exhibit P-1, as officially translated, is in these terms:—

> " A command from Shri Sat Guru Sacha Padshah to the Namdharies of Halqa—Sirsa."
>
> " Every Namdhari of this Halqa is commanded by Shri Sat Guru that he should make every effort for the success of Shri Ram Dayal Vaid, a candidate for the Punjab Vidhan Sabha, by giving his own vote and those of his friends and acquaintances, it being our primary duty to make him successful in the election. The election symbol of Shri Vaid is a riding horseman.
>
> (Sd.) Maharaj Bir Singh,
> S/o Sat Guru Maharaj Pratap Singh,
> Jiwan Nagar (Hissar)."

We have looked into the original document also, and we agree with the High Court that the crucial words, like *hukam* of Shri Sat Guru Sacha Padshah, etc., have been printed in very bold letters, conveying the distinct impression to the large number of Namdharis, who are voters in the constituency, that it was a mandate from their spiritual *guru* who wielded great local influence amongst them, that it was their bounden duty, under the strict orders of their religious leader, not only to cast their own votes in favour of the particular candidate, but also to exert their influence amongst their friends and acquaintances in favour of that candidate; and that any infringement of that mandate had implicit in it divine displeasure or spiritual censure.

It was contended on behalf of the appellant that a religious leader has as much the right to freedom of speech as any other citizen, and that, therefore, his exhortation in favour of a particular candidate should not have the result of vitiating the election. There cannot be the least doubt that a religious leader has the right freely to express his opinion on the comparative merits of the contesting candidates and to canvass for such of them as he considers worthy of the confidence of the electors. In other words, the religious leader has a right to exercise his influence in favour of any particular candidate by voting for him and by canvassing votes of others for him. He has a right to express his opinion on the individual merits of the candidates. Such a course of conduct on his part, will only be a use of his great influence amongst a particular section of the voters in the constituency; but it will amount to an abuse of his great influence if the words he uses in a document, or utters in his speeches, leave no choice to the persons addressed by him, in the exercise of their electoral rights. If the religious head had said that he preferred the appellant to the other candidate, because, in his opinion, he was more worthy of the confidence of the electors for certain reasons good, bad or indifferent and addressed words to that effect to persons who were amenable to his influence, he would be within his rights, and his influence, however great, could not be said to have been misused. But in the instant case, as it appears, according to the findings of the High Court, in agreement

with the Tribunal, that the religious leader practically left no free *choice* to the Namdhari electors, not only by issuing the *hukam* or *farman*, as contained in Exhibit P-1, quoted above, but also by his speeches, to the effect that they must vote for the appellant, implying that disobedience of his mandate would carry divine displeasure or spiritual censure, the case is clearly brought within the purview of the second paragraph of the *proviso* to section 123 (2) of the Act. This aspect of the case has been dealt with at length by the High Court in a well-considered judgment, and we do not think it necessary to repeat all those observations, beyond saying that we agree with them. In that view of the matter, it is not necessary for us to consider the further question whether cl. (2) of section 123 of the Act, apart from the *proviso*—para. (ii), discussed above—covers a case like the present, where the undue influence is of a spiritual character as distinguished from threats of injury to person or property. As the main ground urged in support of the appeal against the judgment of the High Court, fails, the appeal must be dismissed with costs, to the Respondent No. 1.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction).

PRESENT :—P. B. GAJENDRAGADKAR, A. K. SARKAR AND K. SUBBA RAO, JJ.

The State of Madhya Pradesh .. *Appellant**

v.

Mubarak Ali .. *Respondent.*

Prevention of Corruption Act (II of 1947), *section* 5-*A—Object—Provisions to be strictly complied with —Valid permission under—Investigation, what constitutes—(Criminal Procedure Code (V of* 1898), *section* 4 (1) *and Chapter XIV)—Investigation.*

The Madhya Pradesh Court in Criminal Revision held (1) that the Magistrate gave the permission under section 5-A of the Prevention of Corruption Act (II of 1947) as a mere matter of routine without satisfying himself as to its advisability ; (ii) that the investigation started 10 days prior to the obtaining of permission aforesaid, and so set aside the order of the Special Judge (rejecting the objections to the legality of the permission) with a direction that *in order to rectify the defects and cure the illegality he should order the Deputy Superintendent of Police to carry on the investigation himself* while the case remains pending on his file. The State appealed to the Supreme Court against the said order of the High Court.

The materials on record disclosed the followings facts : One Bhalla gave information to the Sub-Inspector of Police on 11th January, 1955, as regards the attempt of the accused Assistant Station-Master, and another to take bribe from him. That same day the said police officer assisted the informant Bhalla to trap the accused, came on the scene, questioned the accused, searched his person and recovered the marked notes and other articles from him ; he searched the person of the informant also and recovered the marked notes not given to the accused. He further took possession of the 20 boxes intended to be booked and the Forwarding Note with the record copy of the Railway Receipt. Relevant memoranda for the recoveries were got prepared duly attested by witnesses. Thereafter on that basis, the Sub-Inspector sent a report to the Special Police Establishment Indore (Madhya Bharat) which was entered by them in their Register on 14th January, 1955.

The only material placed before the Special Judge as regards permission was the application filed on 21st January, 1955, by the Sub-Inspector before the Magistrate seeking the said permission and the order thereon. In the application the Sub-Inspector stated that he had been deputed to investigate the case and therefore permission might be given to him under section 5-A of the Act. On that, the Magistrate passed the order 'permission given'.

Held : Section 5-A was inserted in the Prevention of Corruption Act (II of 1947) by Act LIX of 1952 to protect the public servants against harassment and victimization. It is also in the interest of the public that honest public servants should be able to discharge their duties free from false,

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* Cr. Appeal No. 141 of 1958. 3rd February, 1959.

frivolous and malicious accusations. To that end, section 5-A introduced the safeguard that no police officer below the rank of a Deputy Superintendent of Police—elsewhere than in the presidency owns of Bombay, Madras and Calcutta—shall investigate an offence punishable under section 161, 164 or 165, Penal Code (XLV of 1860) or section 5 (2) of Act II of 1947.

This statutory safeguard is mandatory and must be strictly complied with.

Rishbud and Inder Singh v. *The State of Delhi*, (1955) S.C.J. 283 : (1955) 1 M.L.J. (S.C.) 173: (1955) 1 S.C.R. 1150, applied.

The Magistrate's status gives assurance to the *bona fides* of the investigation. It is self-evident that a Magistrate cannot surrender his discretion to a police officer but must exercise it having regard to the relevant materials made available to him at that stage. He must also be satisfied that there are sufficient reasons—administrative—to entrust a subordinate officer with the investigation.

It is also desirable to give in the order granting permission all the necessary facts on which the order is based. Otherwise proof *aliunde* of the said facts is necessary in the case.

In the instant case, *ex facie* it appears the Magistrate did not realise the significance of his order but only mechanically issued the order on the basis of the application which did not disclose any reason. In agreement with the High Court, it was held, that the provisions of section 5-A were not strictly complied with.

Section 4 (1) of the Code of Criminal Procedure (V of 1898) defines "investigation" as to include all the proceedings under that Code for the collection of evidence conducted by the Police Officer or other persons authorised by the Magistrate in this behalf. Chapter XIV of that Code prescribes the procedure for investigation.

From the facts and circumstances disclosed by the record (stated supra) the High Court correctly held that the investigation in this case was started by the Sub-Inspector on the 11th June, 1955, ten days prior to the obtaining of the permission.

Appeal by Special Leave from the Judgment and Order, dated the 28th November, 1957, of the Madhya Pradesh High Court in Criminal Revision No. 78 of 1957, arising out of the Judgment and Order, dated the 21st August, 1957, of the Court of Special Judge at Gwalior in File No. 2/57, Special Case.

G. C. Mathur and *R. H. Dhebar*, Advocates, for Appellant.

The Judgment of the Court was delivered by

Subba Rao, J.—This is an appeal by Special Leave against the judgment of the High Court of Madhya Pradesh at Jabalpur directing the Special Judge, Indore, to order the Deputy Superintendent of Police to carry on the investigation afresh. The facts are simple.

One Shri Mohinder Nath Bhalla was the manager of Daisy Sewing Machine Co., Ltd., Bhopal. On January 11, 1955, between 12 and 1 P.M., he contacted the Sub-Inspector of Police, Special Police Establishment, Gwalior, and gave him the following information : The Company had opened their stall in the Gwalior Mela and he (Shri Bhalla) had to book empty wooden cases of machine and machine parts from Golakmandir railway station, which was near the Gwalior Mela, to New Delhi. When he went to the Station to enquire for booking the said cases, the Station Master demanded annas ten for each case as illegal gratification, but he did not agree to it. Subsequently, the Assistant Station Master agreed to accept annas eight for each case and asked him to bring the wooden cases between 2 and 4 P.M. on the same day, *i.e.*, January 11, 1955. On this allegation he requested the police to take action " to stop the said sort of corruption". The police officer went along with the informant to his stall at Gwalior Mela and saw the twenty wooden cases—twelve big and eight small—ready for booking. The said Shri Bhalla gave the police officer a typed complaint signed by him and duly attested by two witnesses. With the assistance of the police officer, a trap was laid. The numbers of the rupee notes intended to be given as bribe to the Assistant Station Master were entered in a memorandum which was attested by witnesses. The said rupee-notes were given to Shri Bhalla in the presence of the witnesses. Shri Bhalla was instructed to pay the amount to the Assistant Station Master when demanded by him in such a manner that the witnesses could over-hear the conversation and also see the Assistant Station Master taking the bribe.

He was also told that on his giving a signal, the police would come on the scene. The plan was carried out in detail as agreed. The Assistant Station Master, after some bargaining, took the bribe, and after the act of bribery was completed, Shri Bhalla gave the pre-arranged signal. The Sub-Inspector then went to the Station Office and disclosed his identity to the Assistant Station Master in the presence of witnesses and asked him to produce the money taken by him as bribe. The Assistant Station Master, when questioned by the Sub-Inspector, gave him his name and also produced the notes which he had kept in his pocket. The police officer took those notes and counted them. The numbers on those notes tallied with those noted in the memorandum. He then searched the person of the Assistant Station Master and secured the articles found on him. He also searched the person of Shri Bhalla and took from his shirt two currency notes, which he did not give to the Assistant Station Master, as the bargain was struck at a smaller amount, and secured the same. The numbers of those notes also tallied with the corresponding numbers noted in the memorandum. Thereafter, a memorandum of the articles recovered was prepared in the presence of the witnesses and was duly attested by them. The forwarding note, together with the record copy of the Railway Receipt prepared in respect of the booking of the twenty wooden cases to New Delhi, was taken possession of and another memorandum was prepared in regard to them. An inventory of the twenty wooden cases lying on the platform near the weighing machine as booked by the Assistant Station Master was also prepared and the same was attested by the witnesses. The Sub-Inspector, having regard to the aforesid facts, came to the conclusion that the facts disclosed offences punishable under sections 120-B and 161 of the Indian Penal Code and section 5 (2) of the Prevention of Corruption Act, 1947 (II of 1947), had been committed by the Assistant Station Master, Shri Mubarak Ali, and the pointsman, Shri Mool Chand of Golakamandir railway station. On the same day he sent a report of the aforesaid facts to the Special Police Establishment Office, Madhya Bharat. The office registered it on January 14, 1955, in its register. Seven days thereafter, on January 21, 1955, the Sub-Inspector filed an application before the Additional District Magistrate (Judicial), Gwalior, asking for permission to investigate the offence under the aforesaid sections. The record does not disclose what further steps were taken by the Sub-Inspector after he obtained the said permission from the Additional District Magistrate. On October 1, 1955, a charge-sheet was filed before the Special Judge, Anti-Corruption, Indore. It appears from the record that soon after the case was taken up for trial, the respondent filed objections questioning, *inter alia*, the validity of the order of the Additional District Magistrate giving permission to the Sub-Inspector to make the investigation. But the scope of the objections is not clear as they have not been placed before us. It appears that the Special Judge intended to take evidence on the question of delegation of power of investigation, but the prosecution applied for adjournment on the ground that an appeal had been filed in the High Court against a similar order directing the prosecution to give evidence on the said question and the same was pending there. The learned Special Judge, though inclined not to give the adjournment, made an order giving an adjournment of three weeks on December 3, 1955, on the ground that " the Special Police Establishment Office might not have any grievance on that account ". We do not know what transpired between December 3, 1955, and the date of disposal of the objections by the Special Judge, *i.e.*, August 21, 1957. On August 21, 1957, the learned Special Judge made an order discharging Shri Mool Chand, the pointsman, and charging Shri Mubarak Ali, the Assistant Station Master, under section 161 of the Indian Penal Code. By the said order, the learned Judge, presumably an officer different from the one who gave the adjournment in 1955, disallowed the objection of the accused on the ground that on the date when the Magistrate gave the sanction, there were many papers in connection with a case against the accused, on observing which the Magistrate could have satisfied himself whether there was a *prima faie* case or not against the accused and that there was no reason to believe that at the time of giving the sanction, the Magistrate did not peruse the papers. The accused preferred a Revision against the said order to the High Court of Madhya Pradesh. The High Court came to the conclusion that the Sub-Inspector applied for permission ten days after investigation had started and that the Magistrate did not satisfy

himself that there were good and sufficient reasons for authorising the officer of a lower rank to conduct the investigation but had given the permission as a mere matter of routine. In the result, the High Court set aside the order of the Special Judge with a direction that " in order to rectify the defects and cure the illegality" he should order the Deputy Superintendent of Police to carry on the investigation himself while the case remains pending on his file ". The State preferred the present appeal against the said order of the High Court.

Learned counsel, appearing for the State, raised before us two points : (i) the High Court was not justified in holding that the Magistrate gave the permission as a mere matter of routine without satisfying himself as to the advisability of giving such permission ; (ii) the High Court was wrong in holding that the investigation started ten days prior to the obtaining of permission of the Magistrate by the Sub-Inspector.

To appreciate the first contention, it is necessary to set out some of the relevant provisions of The Prevention of Corruption Act, 1947 (II of 1947), hereinafter referred to as the Act.

Section 3 (*as it stood before the Prevention of Corruption* (*Amendment*) *Act*, 1955 (*L of* 1955) : "An offence punishable under section 161 or section 165 or section 165-A of the Indian Penal Code (Act LXV of 1860) shall be deemed to be a cognizable offence for the purposes of the Code of Criminal Procedure, 1898 (Act V of 1898) notwithstanding anything to the contrary contained therein."

Section 4.—" (1) Where in any trial of an offence punishable under section 161 or section 165 of the Indian Penal Code (XLV of 1860), it is proved that an accused person has accepted or obtained, or has agreed to accept or attempted to obtain, for himself or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed unless the contrary is proved that he accepted or obtained, or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in the said section 161 or, as the case may be, without consideration or for a consideration which he knows to be inadequate."

The Act was passed, as the preamble indicates, to make more effective provisions for the prevention of bribery and corruption among public servants. It introduced a definition of the offence of criminal misconduct in discharging an official duty and new rules of presumption against accused in the case of the said offence. But in the year 1952, by Act LIX of 1952, presumably on the basis of the experience gained, section 5-A was inserted in the Act to protect the public servants against harassment and victimization. If it was in the interest of the public that corruption should be eradicated, it was equally in the interest of the public that honest public servants should be able to discharge their duties free from false, frivolous and malicious accusations. To achieve this object, sections 5-A and 6 introduced the following two safeguards : (1) no police officer below the rank (*a*) in the presidency towns of Madras and Calcutta, of an Assistant Commissioner of Police, (*b*) in the presidency town of Bombay, of a Superintendent of Police and (*c*) elsewhere, of a Deputy Superintendent of Police, shall investigate any offence punishable under section 161, section 165 or section 165-A of the Indian Penal Code (XLV of 1860) or under sub-section (2) of section 5 of the Act, without the order of Presidency Magistrate or a Magistrate of the first class, as the case may be, or make any arrest therefor without a warrant—*see* section 5-A ; (2) no Court shall take cognizance of an offence punishable under section 161 or section 164 or section 165 of the Indian Penal Code (XLV of 1860), or under section 5 (2) of the Act, alleged to have been committed by a public servant, except with the previous sanction, of the appropriate Government—*see* section 6. These statutory safeguards must be strictly complied with, for they were conceived in public interests and were provided as a guarantee against frivolous and vexatious prosecutions. While in the case of an officer of assured status and rank, the Legislature was prepared to believe them implicitly, it prescribed an additional guarantee in the case of police officers below that rank, namely, the previous order of a Presidency Magistrate or a Magistrate of the first class, as the case may be. The Magistrate's status gives assurance to the *bona fides* of the investigation. In such circumstances, it is self-evident that a Magistrate can-

not surrender his discretion to a police officer, but must exercise it having regard to the relevant material made available to him at that stage. He must also be satisfied that there is sufficient reason, owing to the exigencies of administrative convenience, to entrust a subordinate officer with the investigation. This Court in *H. N. Rishbud and Inder Singh* v. *The State of Delhi*[1], emphasised the necessity to adhere strictly to the provisions of section 5-A of the Act. Jagannadhadas, J., who delivered the judgment of the Court, observed at page 1159 :

"When, therefore, the Legislature thought fit to remove the protection from the public servants, in so far as it relates to the investigation of the offences of corruption comprised in the Act, by making them cognisable, it may be presumed that it was considered necessary to provide a substituted safeguard from undue harassment by requiring that the investigation is to be conducted normally by a police officer of a designated high rank. Having regard therefore to the peremptory language of sub-section (4) of section 5 of the Act as well as to the policy apparently underlying it, it is reasonably clear that the said provision must be taken to be mandatory."

After adverting to the argument advanced on behalf of the State, the learned Judge closed the discussion thus at page 1162:

"We are, therefore, clear in our opinion that section 5 (4) and proviso to section 3 of the Act and the corresponding section 5-A of Act LIX of 1952 are mandatory and not directory and that the investigation conducted in violation thereof bears the stamp of illegality."

This Court again considered the scope of section 6 of the Act in *Biswabhusan Naik* v. *The State of Orissa*[2]. One of the questions raised there was that the sanction given by the Government was invalid. In rejecting that contention Bose, J., observed at page 95 :

"The judgment of the Judicial Committee relates to clause 23 of the Cotton Cloth and Yarn (Control) Order, 1943, but the principles apply here. It is no more necessary for the sanction under the Prevention of Corruption Act to be in any particular form, or in writing or for it to set out the facts in respect of which it is given than it was under clause 23 of the Order which their Lordships were considering. The desirability of such a course is obvious because when the facts are not set out in the sanction proof has to be given *aliunde* that sanction was given in respect of the facts constituting the offence charged, but an omission to do so is not fatal so long as the facts can be, and are, proved in some other way."

While the former decision emphasises the importance of the protection given by the Act to public servants against harassment, the latter decision points out the desirability of giving all the necessary facts in an order giving sanction—the same applies to an order of a Magistrate—and also the necessity of proof *aliunde* of the said facts in case the facts are not disclosed in the sanction. Applying the said two principles, we must hold that in a case where an officer other than the designated officer, seeks to make an investigation, he should get the order of a Magistrate empowering him to do so before he proceeds to investigate and it is desirable that the order giving the permission should ordinarily, on the face of it, disclose the reasons for giving the permission. For one reason or other, if the said salutary practice is not adopted in a particular case, it is the duty of the prosecution to establish, if that fact is denied, that the Magistrate in fact has taken into consideration the relevant circumstances before granting the permission to a subordinate police officer to investigate the case.

In the present case, though objection was taken by the accused at the earliest stage in 1955 on the ground that the order giving permission was invalid no attempt was made by the prosecution, though years have elapsed between the date of the petition and that of the order of the Sessions Judge, to adduce any evidence to support the contention that the Magistrate gave the permission to the Sub-Inspector only after satisfying himself on the advisability of doing so on the material placed before him. The only material that was placed before the Sessions Judge was the application filed by the Sub-Inspector before the Magistrate seeking the said permission and the order made by him thereon. In that application the Sub-Inspector stated that he had been deputed to investigate the case and therefore permission might be given to him to do so under section 5-A of the Act. On that application, the

1. (1955) S.C.J. 283 : (1955) 1 M.L.J. (S.C.) 173: (1955) 1 S.C.R. 1150, 1159, 1162.

2. (1954) S.C.J. 537 : (1954) 2 M.L.J. 79 : (1955) 1 S.C.R. 92, 95.

Magistrate passed the order "permission given". Neither the application nor the order made thereon discloses that any material was placed before the Magistrate on the basis of which he gave the permission. *Ex facie* it appears to us, just like it appeared to the High Court, that the Magistrate did not realise the significance of his order giving permission, but only mechanically issued the order on the basis of the application which did not disclose any reason, presumably because he thought that what was required was only a formal compliance with the provisions of the section. A request was made before the High Court that an opportunity should be given to the prosecution to enable them to produce the necessary evidence to support the order of the Magistrate. But the learned Judge of the High Court rightly did not accede to that belated request. We, therefore, without any hesitation, agree with the High Court that the provisions of section 5-A of the Act have not been strictly complied with in this case.

In this view no other question arises for consideration. But as the learned counsel appearing for the State contended that the observations of the learned Judge of the High Court that permission of the Magistrate was obtained ten days after the investigation was started was wrong, it would be as well that we considered the argument briefly. Section 4 (1) of the Code of Criminal Procedure defines "investigation" as to include all the proceedings under that Code for the collection of evidence conducted by the police officer or other persons other than a Magistrate who is authorised by the Magistrate in this behalf. Chapter XIV of the Code prescribes the procedure for investigation. Investigation starts after the police officer receives information in regard to an offence. Under the Code

"investigation consists generally of the following steps: (i) proceeding to the spot; (ii) ascertainment of the fact and the circumstance of the case; (iii) discovery and arrest of the suspected offender; (iv) collection of evidence relating to the commission of the offence which may consist of (*a*) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit; (*b*) the search of places of seizure of things considered necessary for the investigation and to be produced at the trial; and (v) formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet under section 173."

See *H. N. Rishbud and Inder Singh* v. *The State of Delhi*[1]. From the narration of facts given *supra*, it would be seen that in the present case Shri Bhalla gave information to the Sub-Inspector on January 11, 1955, as regards the attempt by the Station Master as well as the Assistant Station Master to take bribe from him. Under section 5 of the Act, attempt to obtain from any person for himself or for any other person any gratification is in itself an offence and therefore the information certainly related to an offence. Thereafter, the Sub-Inspector, after assisting Shri Bhalla to trap the accused, came on the scene, questioned the accused, searched his person and recovered the marked notes and other articles from him; he searched the person of the informant and recovered the other notes marked but not given to the accused; he took possession of the twenty wooden boxes intended to be booked and the forwarding note together with the record copy of the Railway Receipt; he got prepared relevant memoranda for the aforesaid recoveries and got them duly attested by witnesses; and thereafter on the basis of his investigation he sent a report to the Special Police Establishment Office, Indore. We do not know on the material placed before us what further things he did in the matter of investigation between the 14th and 21st when he obtained the permission of the District Magistrate. In the circumstances, we must hold, agreeing with the High Court that the investigation in this case was started by the Sub-Inspector on the 11th, *i.e.*, ten days prior to his obtaining permission of the Magistrate.

The appeal fails and is dismissed.

Appeal dismissed.

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1. (1955) S.C.J. 283 : (1955) 1 M.L.J. (S.C.) 173 : (1955) 1 S.C.R. 1150.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, P. B. GAJENDRAGADKAR AND K. N. WANCHOO, JJ.

Bhagwan Singh .. *Appellant**

v.

Rameshwar Prasad Shastri and Others .. *Respondents.*

Representation of the People Act (XLIII of 1951), section 7 (d)—Contracts signed by candidate as Mukhiya of Panchayat and not in his personal capacity—If disqualifies the cadidate—Construction of contract.

A candidate who has signed contracts with Government not in his individual capacity but as Mukhiya on behalf of the village panchayat of which he was the Mukhiya, is not disqualified for membership of the State Legislature. There are no grounds in the circumstances of the instant case to take the view that the description given by the candidate about his status (Mukhiya of Gram Panchayat) while he signed the contract is no part of the contract itself. The description should be taken to denote the character in which he executed the contract.

It may be the gram panchayat is a body corporate and has a perpetual succession and common seal, and has power to contract in the name of the body corporate—but the invalidity of the contract signed by Mukhiya would not affect the merits of the issue raised under section 7 (*d*) of the Representation of the People Act.

Where the question raised relates to the construction of a contract, the construction of such document cannot be prejudicially affected by the failure of the party to make a more specific and more precise plea in his written statement. [The plea in the instant case was that he had no interest in any contract undertaken by the State Government and he did not add the further particular that the contracts had been executed by him on behalf of the Panchayat.]

Appeal by Special Leave from the Judgment and Order, dated the 8th January, 1959, of the Patna High Court in Election Appeal No. 1 of 1958, arising out of the Judgment and Order, dated the 30th November, 1957, of the Election Tribunal, Patna in Election Petition No. 353 of 1957.

B. K. P. Sinha and *D. P. Singh*, Advocates, for Appellant.

G. C. Mathur and *Dipak Dutta Choudhry*, Advocates, for Respondent No. 1.

R. H. Dhebar, Advocate, for Respondent No. 3.

The Judgment of the Court was delivered by

Gajendragadkar, J.—This appeal by Special Leave arises from the election petition filed by respondent 1 (No. 353 of 1957) in which he claimed a declaration that the election of the appellant as a member of the Bihar Legislative Assembly Maner Constituency should be declared to be void. In the last General Election for the said constituency which was held in February-March, 1957, there were three candidates, the appellant, respondent 1 and respondent 2. The last date for filing nomination papers at the said election was January 29, 1957 ; the said papers were scrutinised on February 1, 1957. Respondent 1 had challenged the validity of the appellant's nomination paper at the said scrutiny but the returning officer had overruled the objection raised by respondent 1 and had accepted the nomination paper of the appellant along with those of the two other candidates. After the counting of votes was done on March 3, 1957, the appellant was declared duly elected at the election inasmuch as he had got 9,826 votes while respondents 1 and 2 had got 7,526 and 49 votes respectively. Thereupon respondent 1 filed his election petition under section 81 of the Representation of the People Act, 1951 (hereinafter called the Act).

In his petition respondent 1 challenged the election of the appellant on several grounds all of which were controverted by the appellant. On the allegations of the parties the tribunal had framed several issues and parties had led evidence on them. At the stage of arguments, however, only a few issues were pressed by respondent 1 and all of them were found against him and in favour of the appellant. In the result the tribunal dismissed the election petition on November 30, 1957.

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* C.A. No. 139 of 1959. 14th April, 1959.

Against the said decision of the tribunal respondent 1 preferred an appeal in the High Court of Judicature at Patna; and in his appeal he pressed only issue No. 1. This issue was whether the nomination of the appellant was hit by the provision of section 7 (*d*) of the Act and as such whether the said nomination had been improperly accepted. On this issue the tribunal had found in favour of the appellant but the High Court reversed the said finding and accepted the plea of respondent 1. As a result of this finding the High Court allowed the appeal preferred by respondent 1 and declared on January 8, 1959, that the election of the appellant was void under section 100 (1) (*a*) of the Act.

The validity of the appellants' nomination has been challenged under section 7 (*d*) of the Act on the ground that at the date of the nomination he had an interest in a contract for the execution of works undertaken by the Bihar Government. There is no doubt that if a person is interested in a contract for the execution of any work undertaken by the appropriate Government he is disqualified for membership of the State Legislature in question. The appellant, however, denied that the disqualification imposed by section 7 (*d*) could be invoked against him. His case was that the contracts in question had not been undertaken by the Bihar Government but they had been undertaken by the Central Government; and he also urged that he had not taken the said contracts individually in his personal capacity, but as the Mukhiya of the Jeorakhan Tola Gram Panchayat. On both these issues the Election Tribunal and the High Court have differed; and it is the said two issues that arise for our decision in the present appeal. It is clear that if the appellant succeeds in showing that he had entered into the impugned contracts not individually but on behalf of the Panchayat of which he was the Mukhiya it would be unnecessary to consider whether the works covered by the said contracts had been undertaken by the Government of Bihar. Let us therefore first consider that point.

The impugned contracts are five in number. They were for the execution of works under local development works programme envisaged under the Second Five-Year Plan formulated by the Government of India. These contracts are evidenced by five documents, Exhibits, 16-A, B, C, D and E. The first is for the construction of Beyapore-Jeorakhan Tola Road, the second for the construction of the Beyapore M. E. School, the third for the construction of a dispensary at Jeorakhan Tola, the fourth for the construction of the Gram Panchayat building, and the last for the construction of a well at the said village. It is admitted by the appellant that these contracts had not been completed at the time of his nomination.

In considering the appellant's plea that he had executed these contracts as a Mukhiya of the Village Panchayat of his village, it would be necessary to bear in mind the background of the scheme in pursuance of which these works were undertaken. The Second Five-Year Plan published by the Planning Commission in 1956 shows that the programme of starting these works was treated as a part of the co-operative movement and the Commission had therefore recommended that the States were to sponsor and assist actively in the organisation and development of Village Panchayats which was an important constituent of the programme of fostering corporate life in the rural areas as it would promote among the rural community active interest in the development programmes of the villages. The object of this programme which would operate in areas not yet reached by the National Extension Service was to enable village communities to undertake works of local benefit mainly with their own labour. The Commission realised that the resources of all the States taken together would fall far short of the requirements of this Plan and so it recommended large transfers of resources from the Centre to the States. In this connection the conclusion of the Commission was that out of Rs. 200 crores sanctioned for the year 1957-1958, 12 crores would be required for the Centre for schemes undertaken or directly sponsored by the Community Project Administration and 180 crores were to form part of the balance for the States. Thus it is obvious that the basic idea underlying the Plan was to evoke popular response to the community projects undertaken in pursuance of the Plan and to leave the execution

of different works adopted under the Plan to be fulfilled by popular local agencies like Village Panchayats.

This policy was emphasised by the Secretary of the Planning Commission in his communication to all State Governments, No. P.C. Pub/52/53 dated August 11, 1953 (H. 1). This communication set out the seven categories of work which were most suitable for assistance and it said that the local contribution in cash or kind or through voluntary labour together with any contribution that the State Government or a local body might make should be a minimum of 50 per cent. of the total cost of each work. The intention was to spread the benefit over as wide an area and to as many people as possible. The State Governments were accordingly requested to arrange for a detailed scrutiny of the schemes before they were accepted and for making adequate provisions providing for their proper execution. They were also required to nominate a liaison officer for each district or other suitable unit for the purpose of checking the execution of the works and for maintenance of such initial accounts as might be necessary. This communication makes detailed provisions about financing and accounting procedures to be followed and required the State Governments to make progress reports from time to time.

It appears that the Government of India was aware that the District Boards whose primary responsibility it was to sponsor these undertakings would find the project beyond their financial resources and so it accepted the recommendation of the Planning Commission to contribute 50 per cent. of the cost of each of the schemes on the condition that the remaining half had to be found by the District Board or by the public to be benefited by it in the form of cash or voluntary labour.

The five impugned contracts related to community projects of the kind envisaged by this programme. By its letter, dated February 27, 1954 (H. 2) the Bihar Government had advised all the District Local Boards to assist the execution of such projects and to afford all facilities to and co-operate with the district officers in the execution of the programmes undertaken by these projects without charging any remuneration for the same. The idea clearly was that if the Village Panchayats sponsored works undertaken under these programmes they should encourage people to contribute labour and even money. The result would be that the works undertaken would benefit the community at large and if any saving was made in executing the contract it would enure for the benefit of the Village Panchayats that were usually expected to be the sponsoring units. It is in the light of this background that we have to consider the question whether the contracts in question had been executed by the appellant in his individual capacity as contended by respondent 1 or in his capacity as the Mukhiya of the Village Panchayat as urged by the appellant.

The four contracts evidenced by Exhibits 16-A, C, D and E are all similarly executed whereas contract Exhibit 16-B which is in respect of the construction of the Beyapore M. E. School is somewhat differently worded. With regard to this latter contract both the Election Tribunal and the High Court are agreed that it had been executed by the appellant as the Secretary of the Beyapore Madhyamik Vidyalaya and that in this contract the appellant was not personally interested. The Election Tribunal took the view that the other contracts are substantially of the same character whereas the High Court has held that they are entirely different and that the appellant has personally executed them. The question which we have now to decide is whether this view of the High Court is right.

We would take Exhibit 16-A as typical of the remaining four contracts. The material terms of this contract are 8 in number and they are all in the prescribed form. At the commencement of the contract the appellant has described himself by his name and he has stated that he belongs to the village of Jeorakhan Tola and that his profession is cultivation. The preamble to the contract shows that the appellant undertook to carry out the construction of the development project under local works programme mentioned in the contract as per estimate attached thereto and he agreed to execute the work according to and subject to the terms and conditions contained therein, and he also undertook to contribute 50 per cent. of the

cost in cash and labour. At the end the appellant has signed as Mukhiya and has given his address as Jeorakhan Tola Gram Panchayat. The High Court took the view that the description of the appellant given by him at the time when he signed the contract was not a term of the contract and could not therefore support his plea that he had executed the contract as Mukhiya of the Panchayat. It is on this ground that the High Court distinguished this and the other three allied contracts from the school contract, Exhibit 16-B. In this latter contract the appellant has described himself as the Secretary, Madhyamik Vidayalaya, both at the commencement of the document and at the end where the appellant has signed. In our opinion the distinction made by the High Court between the two sets of contracts is not valid. We do not see any reason to take the view that the description given by the appellant about his status while he signed the contract is no part of the contract itself. Incidentally we may observe that the contract is accepted by the officer who signs as the S.D.O., Dinapore. The designation of the Officer given by him while signing the acceptance of the contract indicates the character in which the officer has accepted the contract. Similarly the description given by the appellant about his status and character when he signed the contract should be taken to denote the character in which he executed the contract.

The High Court also thought that clauses 4 and 7 by which the appellant undertook liability to execute the contract as required and to become liable for payment of any fine imposed by the local government officer in case of his default clearly showed obligations of a personal type which were inconsistent with his plea that he had entered into the contract as the Mukhiya of the Panchayat. We think that this argument has no force. If the nature of the liability undertaken by these two clauses necessarily involves the conclusion that the execution of the contract must be by an individual person, then it is significant that the same two clauses occur in the school contract and yet the High Court has held that the said contract has been executed by the appellant not in his individual capcity but as the Secretary of the Madhyamik Vidyalaya. Therefore too much reliance cannot be placed upon these two clauses to support the view that the contract has been executed by the appellant personally.

Besides, the High Court has not properly considered the term of the contract by which the contracting party undertakes to contribute 50 per cent. of the cost of the work in cash or labour. In other words, the contracting party becomes a sponsoring agent of the contract and agrees to undertake 50 per cent. of its cost. It is very difficult to appreciate the suggestion that the appellant personally and in his individual character agreed to contribute 50 per cent. of the cost in cash or labour. In ordinary course a person who undertakes to carry out a building contract expects to make profit and would never agree to contribute 50 per cent. of the cost of the contemplated work. This clause clearly indicates that the sponsoring of the contract was really done by the Village Panchayat which agreed through its Mukhiya that it would contribute 50 per cent. of the cost either in cash or in labour. Consistently with the general policy of the Plan the Village Panchayat became a sponsoring agent and hoped and expected to obtain popular response from the villagers who would contribute their labour and thus make up the 50 per cent. of the cost of the intended work. Therefore, in our opinion, if the contract in question is considered in the light of the background of the Plan of which it forms one item, and all its conditions are taken into account together, there can be no doubt that the appellant as the Mukhiya of the Village Panchayat acted as its agent when he signed the contract, and not as an individual acting in his personal capacity.

This position is also corroborated by the record kept by the Village Panchayat in respect of these contracts. This record consists of the several proceedings before the Village Panchayat, the budgets adopted by it and the resolutions passed by it from time to time in respect of these contracts. It had been alleged by respondent 1 that the whole of this record had been fabricated for the purpose of the present proceedings. The Election Tribunal has made a definite finding against respondent 1 on this point. It has considered the oral evidence given by the appellant and

other witnesses in proving the said record. It has examined the entries themselves on their merits and has taken into account the fact that some of the exhibits showed that they had been signed and approved by the District Panchayat Officer from time to time. The tribunal, therefore, thought that it was impossible to believe that all persons who purported to sign the record had helped the appellant to manufacture it simply because the appellant was the Mukhiya of the village. The judgment of the High Court shows that it was not prepared to reverse this finding in terms. It has, however, made certain observations in respect of this record which would show that it was not prepared to attach any importance to it. "The papers" says the judgment, " do not inspire much confidence and cannot be relied upon in proof of the facts disclosed by them ". It is unfortunate that when a serious allegation was made against the whole of the record alleged to have been kept by the Village Panchayat and it had been categorically rejected by the Election Tribunal the High Court should not have made its own finding on the point in clear and unambigious terms.

The oral evidence led by the appellant in support of the record and the other material circumstances considered by the Election Tribunal do not appear to have been properly taken into account by the High Court in dealing with this point. The High Court was, however, impressed by what it called two defects in respect of this record. It observed that the accounts had not been audited as required by rule 20 of the Bihar Gram Panchayat Account Rules, 1949 and that the cash balance had not been kept by the Mukhiya in the nearest Post Office Savings Bank or in any recognised Co-operative Bank or a Government Treasury in the name of the Panchayat as required by rule 8. These two defects may undoubtedly suggest that the officers of the Panchayat including the appellant had not acted properly and had not complied with the obligations imposed by the said rules ; but it is difficult to understand how the said two defects can have a material and direct bearing on the question as to whether the record had been fabricated. If the High Court intended to hold that the record had in fact been fabricated it should have considered the relevant evidence and the material circumstances more carefully and should have made a definite finding in that behalf. To say that the record bore only the signatures of the appellant and his clerk and to seek to draw an adverse inference from that fact is, in our opinion, adopting a wrong approach to the question. If the appellant was the Mukhiya he was bound to sign the record, and so was the clerk bound to write it, that cannot therefore be treated as a suspicious circumstance by itself. We have carefully examined this question and we do not see any reason why the well-considered finding of the Election Tribunal on this point should not have been accepted. Therefore, we must assume that the Panchayat record produced by the appellant is not shown to have been fabricated.

Besides, the High Court itself appears to have assumed that this record showed that there was an understanding between the appellant and the Village Panchayat in regard to the financial obligations involved in the execution of the impugned contracts. " It might well be " says the judgment, " that the loss or the profit was ultimately to be borne or pocketed by the Gram Panchayat itself"; but that, according to the High Court, " does not take away the effect of the contract itself which on the face of it was entered into by the appellant himself". If the Panchayat agreed to bear the loss or take the profit flowing from the performance of the contract then it clearly supports the appellant's case that he had executed the contracts as the Mukhiya of the Panchayat. The arrangement to which the High Court refers, if genuine, would be wholly inconsistent with the case set up by respondent 1 that the contract had been executed by the appellant personally.

The High Court has also held that the appellant had not made out this specific case either before the returning officer when his nomination was challenged or in the present proceedings when he filed his written statement. The appellant had no doubt stated in reply that he had no interest in any contract undertaken by the State Government. According to the High Court his failure to add the further particular that the contract had been executed by him on behalf of the Panchayat

shows that the said plea is an after throught. We are unable to see the force of this criticism. But apart from it, the question raised by the appellant relates to the construction of the contract and we do not see how the construction of a document can be prejudicially affected by the failure of the party to make a more specific and more precise plea in his written statement. We have no doubt that, if the contract is considered as a whole, it would show that the appellant had executed it as the Mukhiya of the Village Panchayat and this conclusion cannot be affected by the alleged defect in the plea taken by him in the written statement.

The High Court has also relied on the fact that if the contract was intended to be executed by the appellant on behalf of the Panchayat it should have been executed in the name of the corporate body as required by section 6 of the Bihar Panchayat Raj Act (Bihar Act VII of 1958). It may be that the Gram Panchayat is a body corporate by the name specified in the notification under sub-section (1) of section 3 and has a perpetual succession and a common seal, and so has power to contract in the name of the body corporate; but as the judgment of the High Court itself points out the invalidity of the contract would not affect the merits of the issue raised under section 7 (*d*) of the Act. That is the view taken by this Court in *Chatturbhuj Vithaldas Jasani* v. *Moreshwar Parashram*[1], and that in fact is the point made by the High Court in rejecting the appellant's contention that since the contract was invalid he could not be said to be interested in it under section 7 (*d*) of the Act. Therefore, the invalidity of the contract cannot help us in deciding the question as to whether, on its true construction, the contract can be said to have been executed by the appellant in his personal capacity or as the Mukhiya of the Village Panchayat. Our conclusion, therefore, is that the four impugned contracts have been executed by the appellant as the Mukhiya of the Village Panchayat just in the same way as he had executed the school contract as the Secretary of the Vidyalaya in question. That being so, section 7 (*d*) cannot be invoked against him. In view of this conclusion it is unnecessary to decide whether the works in question had been undertaken by the Government of Bihar or by the Central Government.

The result is that the appeal must be allowed, the order passed by the High Court set aside and that of the tribunal restored; respondent 1 shall pay the costs of the appellant throughout; and the Election Commission shall bear their own.

We would like to add that, after this appeal was argued before us on April 2, 1959, we had announced our decision that the appeal would be allowed and that the judgment would be delivered later on in due course. It is in pursuance of that order that the present judgment has been delivered.

Appeal allowed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, A. K. SARKAR AND K. SUBBA RAO, JJ.

Ram Gopal .. *Appellant**

v.

Anant Prasad and another .. *Respondent.*

Motor Vehicles Act (IV of 1939), section 64 (a) and (f)—Scope—Order renewing permit—Rival applicant against whom no specific order has been made—If person aggrieved—Right of to appeal—Jurisdiction of Appellate Tribunal to grant relief.

Where an order is passed renewing a permit there is in effect a refusal of permit to another person applying for permit for the route. Such person is a person aggrieved by the refusal to grant a permit to him and has a right of appeal to the Appellate Tribunal under section 64 (*a*) of the Motor Vehicles Act. Section 64 (*f*) does not in any way restrict the power of the Appellate Tribunal to grant all proper reliefs in an appeal competent under clause (*a*) of the section. There is nothing in the Motor Vehicles Act to prevent the Appellate Tribunal from setting aside the order of the State Transport Authority renewing a permit. The filing of the appeal by the rival applicant set at large the order granting the renewal.

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1. (1954) S.C.J. 315 : 1954 S.C.R. 817.

* Civil Appeal No. 284 of 1958. 21st April, 1959.

S. Gopala Reddi v. *Regional Transport Authority, North Arcot,* (1955) 2 M.L.J. 130, approved. *Dholpur Co-operative Transport, etc. Union Ltd.* v. *The Appellate Authority, Rajasthan,* A.I.R. 1955 Raj. 19, dissented from.

Appeal from the Judgment and Order, dated the 21st April, 1956, of the former Judicial Commissioner's Court, Rewa, in Misc. Civil Writ No. 27 of 1956.

Naunit Lal, Advocate, for Appellant.

Bhagwan Das Jain, Advocate, for Respondent No. 1.

The Judgment of the Court was delivered by

Sarkar, J.—This appeal arises out of an application for a writ of *certiorari* and involves questions of interpretation of the Motor Vehicles Act, 1939 (IV of 1939) by which grants of permits to run stage carriages and all matters connected therewith are governed.

The appellant was the holder of a permit to run a stage carriage on a stretch of the public highway called the Rewa-Singrauli route, in the State of Vindhya Pradesh which is now merged in the State of Madhya Pradesh. That permit was due to expire on December 11, 1955, and so on September 12, 1955, he made an application for its renewal for a further period. The respondent Anant Prasad who will be referred to as the respondent, made a representation against the renewal of the appellant's permit. He also applied for the grant of the permit to himself. On December 9, 1955, the State Transport Authority, Vindhya Pradesh, made an order in the following terms: "Renewed for three years". It is not in dispute that the order meant that the appellant's permit was renewed for three years. No express order was made on the respondent's application for the grant of the permit to him.

The respondent preferred an appeal against this order to the Vindhya Pradesh Transport Appellate Tribunal, the appellate authority under the Act. It was contended by the appellant before the Appellate Tribunal that the appeal was not competent. The Appellate Tribunal rejected this contention and passed an order cancelling the permit granted to the appellant by the State Transport Authority and issuing the permit to the respondent.

The appellant then moved the Judicial Commissioner, Vindhya Pradesh, for a writ of *certiorari* quashing the order of the Appellate Tribunal on the ground that it disclosed an error on the face of it because under the Act no appeal lay from the order that was passed by the subordinate authority. The learned Judicial Commissioner held that the appeal was competent and dismissed the application for the writ. Hence the present appeal.

The question is: Did an appeal lie to the Appellate Tribunal from the order made by the State Transport Authority in the present case? Section 64 of the Act contains the provisions for appeals. Whether the appeal lay or not will have to be decided by reference to these provisions. The portion of the section which will have to be considered is in these terms:

"*Section* 64.—Any person—

(*a*) aggrieved by the refusal of the State or a Regional Transport Authority to grant a permit . . . . or

. . .

(*e*) aggrieved by the refusal of renewal of a permit, ... or

(*f*) being a local authority or police authority or an association which, or a person providing transport facilities who, having opposed the grant of a permit is aggrieved by the grant thereof. . . . may....................appeal to the prescribed authority........................"

The prescribed authority was, as we have earlier stated, the Appellate Tribunal. Clearly the respondent was not a person contemplated by clause (*e*) of

the section. It is also not in dispute that he was not one of those mentioned in clause (*f*). The respondent does not claim that any of these clauses gave him the right of appeal.

He however claims a right of appeal under clause (*a*). In our view that claim is justified. He had applied for a permit and had not got it. He was therefore a person aggrieved by the refusal to grant a permit and clearly came within clause (*a*). It is true that the order of the State Transport Authority did not expressly refuse him the permit. But that no doubt was the effect of the order that was made. He had made an application for the grant of the permit to him and the application was disposed of without granting him the permit but granting it to a competing applicant. There was only one permit which could be granted and the result of the order was to give it to the appellant. The permit was thereby necessarily refused to the respondent. The fact that an express order was not made cannot operate to his prejudice. In *S. Gopala Reddi* v. *Regional Transport Authority, North Arcot*[1], in circumstances identical to those in the present case an order was made by the Transport Authority in the same terms as we have here and it was said:

"The grant of a permit to one, would automatically mean the refusal of the permit to the other".

We are in entire agreement with the view expressed there. Therefore it seems to us that the respondent was a person who had been aggrieved by the refusal to grant him a permit and the appeal by him was fully competent.

But it was said on behalf of the appellant that in the present case it would be wrong to imply an order refusing the permit to the respondent for none such could be made under the Act and therefore here there was no scope for applying section 64 (*a*). The contention was put in this way: When there are a number of applications in respect of the same permit, one of which is by way of renewal to which objections have been filed and the others, fresh applications, the latter could not be taken up for consideration till the former and the objections made to it had been considered. If the objections to the renewal failed, the application for renewal had to be granted and the fresh applications for permit could not then be considered at all. If on the other hand, the objection to the renewal succeeded, the renewal could not be granted and the choice had then to be made from the new applicants for the permit. In the present case the objection to the renewal of the applicant's permit raised by the respondent failed and the appellant's permit was in consequence renewed. Therefore the respondent's application for a permit, which was an application for a new permit, never fell to be considered and that is why no order on it was made at all.

We think this contention completely lacks substance. It was said that that was the result of sections 47, 57 and 58 of the Act but we find nothing in any of them to support it. Section 47 does not deal with the order in which applications for the renewal or grant of a new permit are to be heard and does not help at all. Section 57 (3) provides that after an application for a permit had been made others can make representations against it. These are the objections to an application for the grant or renewal of a permit earlier referred to. Sub-section (5) of section 57 provides that the application for a permit which includes an application for the renewal of a permit and the representations against it shall be disposed of at a public hearing at which the person making the application and the persons making the representations shall be given an opportunity of being heard. But this does not show that all other applications for the same permit and all other representations in connection therewith, cannot be disposed of at the same hearing. Indeed, section 58 (2) puts it beyond doubt that an application for

1. (1955) 2 M.L.J. 130.

renewal of a permit and the fresh applications for the same permit have to be heard together. That section so far as is relevant is in these terms:

> "*Section* 58.—........................
>
> (2) A permit may be renewed on an application made and disposed of as if it were an application for a permit:...................
>
> (*a*) ....
>
> (*b*) ....
>
> provided further that, other conditions being equal, an application for renewal shall be given preference over new applications for permits."

The section therefore requires an application for the renewal of a permit to be dealt with in the same way as a new application for a permit. Such an application has therefore to be heard along with new applications for the permit. Again, no question of giving an application for renewal preference over new applications for permits which the section requires to be given, can arise unless they are considered together. We are therefore unable to hold that in the present case the State Transport Authority had no jurisdiction to consider the respondent's application or to make any order in respect of it as it granted the appellant's application for renewal. It follows that the order that was made amounted in fact to a refusal to grant the permit to the respondent.

It was then said that a renewed permit was a continuation of the old permit and hence once the old permit was renewed, no question of considering the applications for new permit arose. We find nothing to support this view. It is true that in *V. C. K. Bus Service Ltd.* v. *Regional Transport Authority, Coimbatore*[1], this Court held that a renewed permit was a continuation of the old permit but it did not hold that the appropriate authority could not consider the applications for a fresh permit along with the application for renewal of the permit. This case does not assist the appellant at all.

It was then contended that section 64 did not provide for an appeal by a person aggrieved by the renewal of a permit unless he was one of those mentioned in section 64 (*f*), which the respondent was not, and therefore even if an appeal by the respondent was competent under section 64 (*a*), in such an appeal the Appellate Tribunal could not set aside the order of renewal made by the State Transport Authority. It was said that if in such an appeal the order granting a renewal could be set aside, in effect an appeal against an order renewing a permit would become competent though the law did not permit this. We were referred to *Dholpur Co-operative Transport Etc., Union Ltd.* v. *The Appellate Authority, Rajasthan*[2], in support of this contention. It was there said:

> "Where an appeal has been made under clause (*a*) against the refusal of a permit, the Appellate Authority will generally have the right to give relief to the appellant by the grant of a permit, but will not have any jurisdiction to cancel the permit granted to another person, unless a foundation has been laid before the Regional Transport Authority for an appeal provided by clause (*f*) by an objection of somebody entitled to appeal under that clause. If such an objection has been made then it does not matter whether that particular person appeals or not. In such a case, on an appeal under section 64 (*a*), the Appellate Authority may consider the objection of the nature specified in clause (*f*) before the Regional Transport Authority and give its own decision in the matter."

It was said that the respondent though he had filed objections was not a person who can claim a right of appeal under clause (*f*) of section 64. It was therefore contended on the authority of the observations referred to above that no foundation had been laid for an appeal provided by clause (*f*) and so the Appellate Tribunal could not cancel the permit granted to the appellant by the subordinate authority.

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1. (1957) S.C.J. 409 : (1957) M.L.J. (Crl.) 381 : (1957) 2 M.L.J. (S.C.) 43 : (1957) 2 An.W.R. (S.C.) 43 : (1959) S.C.R. 663.
2. A.I.R. 1955 Rajas. 19, 26.

We are unable to agree that in an appeal which is competent under clause (*a*) of the section, the order renewing or granting a permit cannot be set aside unless the case was such that an appeal under clause (*f*) would have also been competent. So to hold would result in making the right of appeal given by clause (*a*) wholly infructuous in those cases where no relief can be given in the appeal except by setting aside the order granting or renewing a permit, for example, where there was only one permit to grant as in the present case. Such an interpretation has to be rejected. It is based on clause (*f*). But this clause cannot be construed in a manner so as to render infructuous another clause in the same section. Nor do we find anything in clause (*f*) to justify such a construction. The different clauses in the section deal with different situations. Each is independent of the others. Clause (*f*) deals with a case where an objection had been filed against the fresh grant or the renewal of a permit but the permit has nonetheless been granted or renewed. The clause gives the objector a right of appeal against the result of the rejection of his objection if he is one of the persons mentioned in it. The clause gives him that right irrespective of the fact whether he has a right of appeal under any of the other clauses or not. It does not say that a permit granted or renewed cannot be questioned except at the instance of the persons mentioned in clause (*f*); it does not affect the right of appeal under the other clauses. If an appeal lies under any of the other clauses, that of course must be an effective appeal and the appellate authority must therefore have all powers to give the relief to which the appellant is found entitled.

Again section 64 is not concerned with defining the powers of the appellate authority and does not purport to do so. Nor is there anything in the Act to lead to the conclusion that an applicant for a permit is bound to put in objections against the applications of competing applicants for the grant or the renewal of the permit. The relief that can be granted in an appeal by any person which is competent would not depend on whether he had put in objections against the applications of the competing applicants or not.

We do not therefore think that clause (*f*) of section 64 in any way restricts the power of the Appellate Tribunal to grant all proper reliefs in an appeal competent under clause (*a*) of the section. If clause (*f*) does not so restrict the power of the Appellate Tribunal, nothing else has been pointed out to us as having that effect. In our view, there is nothing in the Act to prevent the Appellate Tribunal from setting aside the order of the State Transport Authority renewing the appellant's permit. We think the matter was correctly put in *S. Gopala Reddi's case*[1] when it was said at page 132:

"The appeal was, in our opinion, perfectly competent as an appeal against the order of the Regional Transport Authority, refusing to grant a permit. The fact that such an appeal involved an attack on the order granting a renewal of a permit to the 4th respondent would not prevent the appeal being what it was, *viz*., an appeal against a refusal to grant a permit, to the appellant. The Central Road Traffic Board erred in presuming that it was not open to them in the appeal to consider the merits of the order granting renewal of the 4th respondent's permit. Indeed, the first question which had to be determined in the appeal filed by the appellant would be the propriety of the action of the Regional Transport Authority in granting renewal to the 4th respondent. The filing of the appeal by the appellant set at large the order of the Regional Transport Authority granting the renewal."

In the *Dholpur Co-operative Transport, etc., Union Ltd. case*[2] on which the appellant relies, no objection had been filed against any of the competing applications for the grant of a permit and it was held that the appellate authority had no power in such circumstances on appeal by a person whose application for the grant of the permit had been refused, to give relief by cancelling a permit granted by the subordinate authority to one of the applicants. It was there

1. (1955) 2 M.L.J. 130.
2. A.I.R. 1955 Raj. 19.

thought that *Nadar Transport, Tiruchirapalli* v. *State of Madras*[1] led to this conclusion. For the reasons earlier mentioned we are unable to agree with this part of the decision in the *Dholpur Co-operative Transport, etc., Union Ltd. case*[2]. With the rest of the decision there we are not concerned and as to that we do not say anything. We also find nothing in the *Nadar Transport case*[1], to support the conclusion arrived at in *Dholpur Co-operative Transport, etc. Union Ltd. case*[2]. In the *Nadar Transport case*[1], on the contrary, it was observed that:

> " Section 64, sub-sections (*a*) and (*f*) are intended in our opinion to apply to different situations",

and that

> " The power of the appellate authority is not restricted in any manner either by the provision of section 64 or by any of the rules made under the powers conferred by the Act".

It was there held that in an appeal under section 64 (*a*) no grounds other than those taken before the lower authority could be canvassed. That does not lead to the conclusion that on proper grounds all reliefs necessary to make the appeal effective cannot be granted. We think that the *Nadar Transport case*[1], was misunderstood.

The result is that this appeal fails and it is dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

[Criminal Appellate Jurisdiction.]

PRESENT:—S. J. IMAM, J. L. KAPUR, JJ.

Ranjit Singh .. *Appellant**

v.

The State of PEPSU (now Punjab) .. *Respondent.*

Penal Code (XLV of 1860), *sections* 191 *and* 193—*Scope of liability under Oaths Act (X of* 1873) *section* 14.

Criminal Procedure Code (V of 1898), *sections* 200 *and* 202—*Preliminary enquiry before issue of process—When essential.*

Whenever a man makes a statement in Court on oath he is bound to state the truth, and if he does not, he makes himself liable under the provisions of section 193 of the Penal Code. It is no defence to say that he was not bound to enter the witness-box. A defendant or even a plaintiff is not bound to go into the witness-box but if either of them chooses to do so he cannot, after he has taken the oath to make a truthful statement, state anything which is false. Even " belief " would fall under *Explanation* 2 to section 191, Penal Code.

Under section 200, proviso (*aa*) of the Criminal Procedure Code, it is not necessary for a Magistrate when a complaint is made by a Court to examine the complainant and neither section 200 nor section 202 requires a preliminary enquiry before a Magistrate can assume jurisdiction to issue process against the person complained against.

Appeal by Special Leave from the Judgment and Order, dated the 7th March, 1956, of the former PEPSU High Court in Criminal Revision No. 45 of 1956, arising out of the Judgment and Order, dated the 22nd February, 1956, of the Additional Sessions Judge, Patiala, in Criminal Appeal No. 175|36 of 1955-56.

Pritam Singh Safeer, Advocate, for Appellant.

N. S. Bindra, Senior Advocate (*T. M. Sen,* Advocate, with him), for Respondent.

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1. I.L.R. (1953) Mad. 367 : (1952) 2 M.L.J. 361 : A.I.R. 1953 Mad. 1, 3.
2. A.I.R. 1955 Raj. 19.

* Criminal Appeal No. 19 of 1957. 21st April, 1959.

The Judgment of the Court was delivered by

Kapur, J.—This is an appeal by Special Leave against the judgment and order of the High Court of PEPSU passed in revision. The appellant was a sub-Inspector of Police who at the relevant time was the Station House Officer in-charge Shehna police station in the erstwhile PEPSU State. He was convicted under section 193, Indian Penal Code, by a First Class Magistrate and his appeal to the Sessions Judge, Patiala, was dismissed except as to sentence. He took a revision to the PEPSU High Court but that was also dismissed.

This appeal has arisen in the following circumstances: One Surjit Singh, son of Risaldar Waryam Singh, was arrested on September 25, 1953, at Barnala in PEPSU State by the Police Inspector Jaswant Singh. He was kept in the lock-up at Barnala and on the following day his custody was handed over to the appellant and he was taken to Shehna and was kept in custody—it is not clear under what section—in the police station lock-up at Shehna. Surjit Singh was there kept in custody from September 25, 1953, till October 10, 1953, when at about 10 P.M., he was surreptitiously removed to Police Station Dialpur and then to Police Post Hamirgarh and from there was taken to Police Station Baga Purana in Ferozepur District, of the then Punjab. An application under section 491 of the Criminal Procedure Code and under Article 226 of the Constitution was made for a writ of *habeas corpus* and *mandamus* in the High Court of PEPSU. In that petition it was alleged that Surjit Singh was being kept in unlawful custody without any charge being made and without obtaining a remand by a Magistrate. In reply to this, an affidavit, dated October 13, 1953, was filed by the apellant in which he stated that Surjit Singh had association with notorious dacoits; that he, the appellant, had never taken him into custody at any time; that the said Surjit Singh was absconding and had not been arrested in spite of the best efforts of the police; that at the time of the making of the affidavit he was not in the appellant's custody and that it was incorrect that Inspector Jaswant Singh had ever entrusted Surjit Singh to his (appellant's) custody. He also stated that no petition had been brought to him nor had he received any telegram in connection with the custody of Surjit Singh. This affidavit was affirmed as follows:—

> " I solemnly affirm that the facts stated from paragraphs Nos. 1 to 7 are true to the best of my knowledge and belief and nothing which is relevant to this case has been kept back from this Hon'ble Court ".

As both the parties admitted before the High Court that Surjit Singh was not in the custody of the appellant the petition was dismissed. On November 9, 1953, the brother of Surjit Singh made an application under section 476, Criminal Procedure Code, for the prosecution of Inspector Jaswant Singh and the appellant for perjury under section 193, Indian Penal Code, in that they had filed false affidavits. This matter was heard by another learned Judge of that Court who ordered the prosecution of the appellant and directed the Registrar of the High Court to file a complaint which was filed.

The complaint was taken cognisance of by the First Class Magistrate at Patiala who convicted the appellant and sentenced him to nine months' imprisonment and a fine of Rs. 300 and in default to undergo simple imprisonment for two months. The appellant took an appeal to the Sessions Judge, Patiala, who confirmed the order of conviction but reduced the sentence to one of three months' simple imprisonment and a fine of Rs. 50 and in default one month's simple imprisonment, a revision against this order was dismissed *in limine* by the Chief Justice although he gave reasons for dismissing it. The appellant then obtained special leave from this Court.

On behalf of the appellant the first contention raised was that the appellant was not bound to file an affidavit and therefore he could not be convicted under

section 193, Indian Penal Code, because his case did not fall under section 191, Indian Penal Code. In support of his contention he relied upon the Rules of the PEPSU High Court framed for the purpose of proceedings under Art. 226 and section 491 (2), Criminal Procedure Code, for the issuing of writs of *habeas corpus*. He also referred to the Rules made by that Court for the issuing of writs of *mandamus*, prohibitions, *quo warranto* and *certiorari* under Article 226 and submitted that there was no Rule in the former, *i.e.*, for writ of *habeas corpus* requiring a return to be made on behalf of the respondent—to be supported by an affidavit whereas in the latter, *i.e.*, issuing of writs of *mandamus*, etc., an affidavit was necessary and therefore it was submitted that section 191 was inapplicable. Rule 2 of the Rules of the Court required that when a Judge was of the opinion that prima facie case had been made out for granting the application a rule *nisi* was to issue calling upon the person or persons against whom the order was sought, to appear before the Court and to show cause why such an order should not be made. As has been pointed out in *Greene* v. *Home Secretary*[1] which was a case under Regulation 15-B of the Defence of the Realm Act the whole object of proceedings for a writ of *habeas corpus* is to make them expeditious, to keep them as free from technicality as possible and to keep them as simple as possible. "The incalculable value of *habeas corpus* is that it enables the immediate determination of the right to the appellant's freedom" (Lord Wright). When there is no question of fact to be examined or determined no affidavit is needed. As soon as there emerges a fact into which the Court feels it should enquire the necessity for an affidavit arises. Ordinarily an affidavit may not be necessary in making the return if the detention is under orders of the detaining authority in exercise of its plenary discretion as in *Liversidge* v. *Anderson*[2] and in *Greene's case*[1] or a person is detained under the orders of a Court. But where the detention is as it was in the present case, it becomes necessary for the detaining authority to justify its action by disclosing facts which would show to the satisfaction of the Court that the custody is not improper. Where the prisoner says "I do not know why I have been detained, I have done no wrong", it is for the detaining authority to justify the custody. When issues of fact are raised and the actions of the police officers, as in the present case, are expressly challenged and facts are set out which if unrebutted and unexplained would be sufficient for the writ to issue, an affidavit becomes necessary. It cannot be said therefore that in the present case the appellant was not legally bound to place facts and circumstances before the Court to justify the detention of Surjit Singh and this could be done by an affidavit.

Section 4 of the Oaths Act lays down the authority to administer oaths and affirmations and it prescribes the Courts and persons authorised to administer by themselves or by their officers empowered in that behalf oaths and affirmations in discharge of the duties or in exercise of the powers imposed upon them and they are, all Courts and persons having by law the authority to receive evidence. Section 5 prescribes the persons by whom oaths or affirmations must be made and they include all witnesses *i.e.*, all persons who may lawfully be required to give evidence by or before any Court. These two sections show that the High Court or its officers were authorised to administer the oath and as the appellant was stating facts as evidence before the High Court he had to make the oath or affirmation and was bound to state the truth. Section 14 of that Act is in the following words:

> " *Section* 14. Every person giving evidence on any subject before any Court or person hereby authorised to administer oaths and affirmations shall be bound to state the truth on such subject."

As the appellant was giving evidence on his own behalf in that he was denying the allegation made in the affidavit of the brother of Surjit Singh he was bound

1. L.R. (1942) A.C. 284, 302.
2. L.R. (1942) A.C. 206.

to state the truth on the subject on which he was making the statement. The contention therefore that under section 191 of the Indian Penal Code the relevant portion of which is:

> "*Section* 191. Whoever being legally bound by an oath or by an express provision of law to state the truth. . . . . . . makes any statement which is false and which he either knows or believes to be false or does not believe to be true, is said to give false evidence."

the appellant was not legally bound by oath to state the truth cannot be supported. On the other hand at the stage of the proceedings in the High Court where it was being alleged that Surjit Singh was being detained by the appellant illegally it was necessary, for the appellant to make an affidavit in making a return and therefore if the statement is false, as it has been found to be, then he has committed an offence under section 193.

The opening words of section 191 "whoever being legally bound by an oath or by an express provision of law to state the truth........." do not support the submission that a man, who is not bound under the law to make an affidavit, can, if he does make one, deliberately refrain from stating truthfully the facts which are within his knowledge. The meaning of these words is that whenever in a Court of law a person binds himself on oath to state the truth he is bound to state the truth and he cannot be heard to say that he should not have gone into the witness-box or should not have made an affidavit and therefore the submission that any false statement which he had made after taking the oath is not covered by the words of section 191, Indian Penal Code, is not supportable. Whenever a man makes a statement in Court on oath he is bound to state the truth and if he does not, he makes himself liable under the provisions of section 193. It is no defence to say that he was not bound to enter the witness-box. A defendant or even a plaintiff is not bound to go into the witness-box but if either of them chooses to do so he cannot, after he has taken the oath to make a truthful statement, state anything which is false. Indeed the very sanctity of the oath requires that a person put on oath must state the truth. In our opinion this contention is wholly devoid of force and must be repelled.

It was contended that the officer before whom the appellant swore the affidavit, *i.e.*, the Deputy Registrar of the High Court of PEPSU was not authorised to administer oaths. That officer as a witness for the prosecution has stated that he could administer an oath and therefore this contention of the appellant is also without any force and must be repelled.

It was also argued that the affidavit filed by the appellant was affirmed as being true to the best of knowledge and belief and therefore it could not be said as to which part was true to the appellant's knowledge and which to his belief. We have read the affidavit which consists of 7 paragraphs and each paragraph relates to affirmation of a fact which, if true, could only be so to the appellant's knowledge. But even belief would fall under *Explanation* 2 to section 191 which is as under:

> "*Explanation* 2 *to section* 191. A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know."

The appellant relied upon a judgment of the Allahabad High Court in *Emperor* v. *Lachmi Narain*[1]. But unless there was something peculiar in the facts of that case it cannot be considered to be good law. It does not even take into consideration *Explanation* 2 of section 191.

Lastly it was urged that the procedure adopted by the Magistrate was erroneous in that he did not hold an enquiry as required under sections 200 and 202,

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1. I.L.R. (1947) All. 155.

Criminal Procedure Code, the former of which is expressly mentioned in sub-section (2) of section 476, Criminal Procedure Code. That contention is equally untenable because under section 200, proviso (*aa*) it is not necessary for a Magistrate when a complaint is made by a Court to examine the complainant and neither section 200 nor section 202 requires a preliminary enquiry before the Magistrate can assume jurisdiction to issue process against the person complained against.

In our opinion the appellant has been rightly convicted and we would therefore dismiss this appeal.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Original Jurisdiction).

PRESENT :—S. R. DAS, *Chief Justice*, N. H. BHAGWATI, B. P. SINHA, K. SUBBA RAO AND K. N. WANCHOO, JJ.

Pandit M. S. M. Sharma .. *Petitioner**

v.

Sri Krishna Sinha and others .. *Respondents.*

Constitution of India (1950), *Articles* 194 (3) *and* 19 (1) (*a*)—*Respective scope and effect—Freedom of speech and its application to the press.*

By the majority.—Our Constitution clearly provides that until Parliament or the State Legislature as the case may be, makes a law defining the powers, privileges and immunities of the House, its members and committees, they shall have all the powers, privileges and immunities of the House of Commons as at the date of the commencement of the Constitution. The House of Commons had at the commencement of the Constitution the power or privilege of prohibiting the publication of even a true and faithful report of the debates or proceedings that take place within the House.

Assuming that a citizen and editor of a newspaper has under Article 19 (1) (*a*) of the Constitution the fundamental right to publish a true and faithful report of the debates or proceedings that take place in the Legislative Assembly, the provisions of Article 19 (1) (*a*) which are general, must yield to Article 194 (1) and the latter part of its clause (3) which are special.

Accordingly the Houses of the Legislatures in India has the privilege under Article 194 (3) of the Constitution to prohibit the publication of such part of the proceedings which had been directed to be expunged.

Per *Subba Rao, J.*—In the year 1950 the House of Commons had no privilege to prevent the publication of the correct and faithful reports of its proceedings save those in the case of secret sessions held under exceptional circumstances and had only a limited privilege to prevent *mala fide* publication of garbled, unfaithful or expunged reports of the proceedings.

The fundamental right under Article 19 (1) (*a*) is preserved despite the provisions of Article 194 (3) of the Constitution.

The Legislature has the privilege of preventing only *mala fide* publication of the proceedings of the Legislature and as in the instant case the petitioner was not alleged to have done so, the Legislature had no power to take any action in respect of the said publication.

Petition under Article 32 of the Constitution of India for the Enforcement of Fundamental Rights.

Basdeva Prasad, Advocate (with permission of the Court) and *Naunit Lal*, Advocate, for the Petitioner.

C. K. Daphtary, Solicitor-General of India (*B.K.P. Sinha* and *S. P. Varma*, Advocates, with him) for Respondents.

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*Petition No. 122 of 1958. 12th December, 1958.

H. N. Sanyal, Additional Solicitor-General of India, for the Attorney-General for India (by notice under Order 41, rule 1, Supreme Court Rules).

The Judgments of the Court was delivered by

Das, C.J. : (ON BEHALF OF THE MAJORITY).—The petitioner before us, who is a citizen of India, is by profession a journalist and has at all material times been and is still working as the editor of the SEARCHLIGHT, one of the well-known English daily newspapers having a large circulation in Patna and other places in the State of Bihar. The first respondent has at all material times been and is the Chief Minister of the State of Bihar and the Chairman of the Committee of Privileges of the Bihar Legislative Assembly. The Committee of Privileges has been impleaded as the second respondent as if it is a legal entity entitled to sue or to be sued in its name. The third respondent is called and described as the Secretary to the Bihar Legislative Assembly as if it also is a legal entity but the incumbent of that office has not been named in the cause title. As no objection has been taken to the way the second and the third respondents have been impleaded as parties nothing further need be said about the propriety of such procedure.

This petition under Article 32 of the Constitution raises several important questions of far-reaching effect. It came to be filed in the following circumstances : In his speech made in the Bihar Legislative Assembly on May 30, 1957, in course of the general discussion on the Budget for the year 1957-58 Shri Maheshwar Prasad Narayan Sinha, a Congress member of that Assembly, delivered what has been described as "one of the bitterest attacks against the way the Chief Minister was conducting the administration of the State". The Chief Minister, who also belongs to the Congress Party, is the first respondent before us. Shri Maheshwar Prasad Narayan Sinha referred to the way the Chief Minister, according to him, was being guided by the advice of a gentleman who was well understood by all to be Shri Mahesh Prasad Sinha, who was an ex-minister of Bihar and had been defeated at the last general elections. The member referred, as common knowledge, to the activities of Shri Mahesh Prasad Sinha in the selection of Ministers and the formation of the Ministry as also to the glaring instances of encouragement of corruption by the government by, amongst other things, the transfer of a Muslim District Engineer from Darbhanga to Muzaffarpur for exploiting that officer's influence on the Muslim voters of Muzaffarpur. Similar reference was made to the case of a District and Sessions Judge who, notwithstanding the recommendation for his discharge made by the Chief Justice after a regular judicial enquiry had been held by a High Court Judge, was ordered only to be transferred to another place on the intervention of Shri Mahesh Prasad Sinha. The member strongly criticised the appointment of Shri Mahesh Prasad Sinha as the Chairman of the Bihar State Khadi Board as having been made only to enable him to stay in Patna where residential accommodation at Bailey Road had been procured for him. The distribution of portfolios amongst the ministers did not also escape strictures from this member. There is no dispute—indeed it is admitted in paragraph 6 of the present petition—that immediately after Shri Maheshwar Prasad Narayan Sinha referred to the question of appointment of the Chairman of the Khadi Board, a point of order was raised by another member of the Assembly, Shri Satendra Narain Agarwal, and the Speaker stated as follows :

> "Mahesh Babu ke sambandh me jitni baten kahi gain uske bare me maine kah diya ki us tarah ki bat ko proceedings se nikal diya jayega lekin State Khadi Board ke Chairman ke bare me jo kuch kahenge we karyawahi me rahenge or iske vishai me manniya sadasyā ko kahane ka hak hai,"

which translated into English means roughly :—

> "I have already ruled with reference to whatever has been said about Mahesh Babu that such words would be expunged from the proceedings but that whatever may be said with reference to the Chairmanship of the State Khadi Board will remain in the proceedings and the Hon'ble member has the right to speak on that matter."

In its issue of May 31, 1957, THE SEARCHLIGHT published a report of the speech of Shri Maheshwar Prasad Narayan Sinha which is set out in paragraph 2 of the petition and also reproduced in what has been called "annexure B" in annexure III to the petition. It will suffice, for the purposes of our decision of this petition, to set out the opening part of the report which reads as follows :

" **Bitterest attack on Chief Minister.**

M. P. SINHA'S CHOICE AS KHADI BOARD CHIEF CONDEMNED.

Maheshwar Babu's scathing criticism of Government.

(BY OUR ASSEMBLY REPORTER).

PATNA, MAY, 30.

One of the bitterest attacks against the way the Chief Minister was conducting the administration of the State was made in the Bihar Assembly today by Mr. Maheshwar Prasad Narayan Sinha a Congress member, who said that contrary to all principles of good government, the Chief Minister was guided by the advice of a gentleman who had been defeated at the election and stood condemned before the bar of public opinion. He also named the gentleman by whose advice the Chief Minister was allegedly running the administration.

In his sixty-minute speech which was punctuated with frequent applause by Congress as well as Opposition benches, Mr. M. P. N. Sinha said that corruption could not be eradicated from Government unless the Chief Minister refused to be influenced by such undesirable elements.

He said it was common knowledge that during the period of the formation of the new ministry which took unduly long time many aspirants for Ministership and Deputy Ministership went to a defeated Minister for pleading their case so that the defeated Minister concerned could influence the Chief Minister."

It has not been denied by the learned advocate for the petitioner that the references to the gentleman who had been defeated at the election and was said to have stood condemned and by whose advice the Chief Minister (respondent 1) was alleged to be guided, were intended to be and were understood by the public to be references to Shri Mahesh Prasad Sinha, all references to whom had, as hereinbefore mentioned, been directed by the Speaker to be expunged from the proceedings.

On June 10, 1957, one Shri Nawal Kishore Sinha, a member of the Bihar Legislative Assembly, gave notice to the Secretary, Bihar Legislative Assembly (respondent 3) that he wanted to raise a question of the breach of privilege of the House. That notice was in the following terms :

" To

THE SECRETARY,

BIHAR LEGISLATIVE ASSEMBLY,

PATNA.

The 10th June, 1957.

Sir,

I give notice that I want to raise the following question involving a breach of privilege of the House after question-hour today.

" That the Hon'ble Speaker ordered that all references regarding Shri Mahesh Prasad Sinha, Ex-Industry Minister, made in the speech of Shri Maheshwar Prasad Narayan Sinha on the 30th May, 1957, except that of his appointment as the Chairman of the Khadi Board, be expunged but in spite of this the SEARCHLIGHT, a local daily, published the entire speech of Shri Maheshwar Prasad Narayan Sinha, containing all references to Shri Mahesh Prasad Sinha which were ordered to be expunged. Hence there has been a breach of the privilege of the House. A copy of the SEARCHLIGHT, dated the 31st of May, is filed herewith.

Yours faithfully,

Nawal Kishore Sinha, M.L.A."

An account of the proceedings that took place in the House on June 10, 1957, appears from "annexure D" in annexure III to the petition. It will appear from that account that after Shri Nawal Kishore Sinha had asked for leave to move his motion, the Speaker read out to the members the relevant rule as to the procedure that has to be followed when, on such leave being asked for, an objection is or is not taken. Thereafter, as no objection was raised in accordance with that rule, the Speaker declared that the mover had received the permission of the House to move his motion. One Shri Karpuri Thakur having remarked that he could express no view without knowing what had been printed and what had been directed not to be printed, the Speaker read out the text of the notice sent in by Shri Nawal Kishore Sinha set out above which referred to the issue of the SEARCHLIGHT in question. As Shri Karpuri Thakur was apparently satisfied by this, the Speaker then requested Shri Nawal Kishore Sinha to move his resolution. The account shows that Shri Nawal Kishore Sinha then said:—

"Sir, I beg to move: that the matter be referred to the Privilege Committee of the House."

No amendment having been moved, the Speaker, according to the report of the proceedings set forth in "annexure D", put the question to the House and, nobody objecting to the same, declared the resolution carried.

It appears that the Committee of Privileges (respondent 2) did not take up the consideration of the matter promptly and while the matter was pending before the Committee sharp exchanges of charges and counter-charges took place between the petitioner and the Chief Minister (respondent 1) as are evidenced by the extracts from the issues of the SEARCHLIGHT of May 27, 28 and 31, 1958. There appears to have been a debate on June 5, 1958, for two hours in the Bihar Legislative Assembly on the alleged failure of the State Government to protect the petitioner from being assaulted by goondas. It is said that these exchanges roused the Committee of Privileges from slumber into activity on August 10, 1958, when it passed a resolution which, according to annexure II to the petition, ran as follows:—

"The question is that Shri M. S. M. Sharma, Editor and Shri Awadhesh Kumar Tiwari, Printer and Publisher of the SEARCHLIGHT be called upon to show cause why appropriate action be not taken against them by reason of the commission of a breach of privilege in respect of the Speaker of the Bihar Legislative Assembly and the Assembly itself by publishing a perverted and unfaithful report of the proceedings of the Assembly relating to the speech of Shri Maheswar Prasad Narain Sinha, M.L.A., expunged portions of whose speech were also published in derogation to the orders of the Speaker passed in the House on the 30th May, 1957 and that they be further directed to be in attendance at the meeting or meetings of the Committee on such date or dates as may be fixed by the Committee for consideration of the case against them."

On August 18, 1958, the petitioner was served with a notice dated August 14, 1958, issued by respondent 3, the Secretary to the Bihar Legislative Assembly, calling upon the petitioner to show cause, on or before September 8, 1958, why appropriate action should not be recommended against him for breach of privilege of the Speaker and the Assembly in respect of the offending publication. It is necessary, in view of one of the points taken by the learned advocate for the petitioner, to set out the full text of this notice which was thus worded:—

"GOVERNMENT OF BIHAR,
LEGISLATIVE ASSEMBLY SECRETARIAT.

Confidential No. 3538-IA.

FROM

SHRI ENAYATUR RAHMAN, B.A., B.L.,
SECRETARY TO THE LEGISLATIVE ASSEMBLY.

TO

SHRI M. S. M. SHARMA,
EDITOR, "THE SEARCHLIGHT",
SEARCHLIGHT PRESS, PATNA.

Patna, August 13/14, 1958.

Whereas a question involving breach of privilege of the Bihar Legislative Assembly arising out of the publication of a news item in the SEARCHLIGHT, dated the 31st May, 1957, under the caption "Bitterest attack on Chief Minister", was raised in the Assembly by Shri Nawal Kishore Sinha,

M.L.A. (Patna) on the 10th June, 1957 and whereas the same, having been referred to the Committee of Privileges for examination, investigation and report, was considered by the Committee which has been pleased to find a *prima facie* case of breach of privilege made out against you.

You are hereby directed to show cause, if any, on or before the 8th September, 1958, why appropriate action should not recommended against you for breach of privilege of the Speaker and the Assembly. Please also take notice that the question will come up for examination by the Committee on the 8th September, 1958, at 11 A.M. in the Official Sitting Room (Ground Floor) of the Assembly Buildings, Patna, and thereafter on such day or days and at such time and place as the Committee may from time to time appoint. You are also informed that if the matter comes to evidence, you can, if you so choose, adduce evidence, both oral and documentary, relevant to the issue, and you must come prepared with the same on the date fixed in this behalf.

(Sd.) Enayatur Rahman,
Secretary to the Legislative Assembly."

Finding that things had begun to move and apprehending an adverse outcome of the enquiry to be held by the Committee of Privileges (respondent 2), the petitioner moved the High Court at Patna under Article 226 for an appropriate writ, order or direction restraining and prohibiting the respondents from proceeding further with the enquiry referred to above. It appears that on August 29, 1958, the Article 226 petition came up for preliminary hearing and after it had been urged for a day and a half before the High Court for admission, the petitioner on September 1, 1958, withdrew that petition allegedly "with a view to avail the fundamental rights granted to him under Article 32 of the Constitution."

The present petition under Article 32 of the Constitution was filed on September 5, 1958. The petitioner contends that the said notice and the proposed action by the Committee of Privileges (respondent 2) are in violation of the petitioner's fundamental rights to freedom of speech and expression under Article 19 (1) (*a*) and to the protection of his personal liberty under Article 21 and the petitioner claims by this petition to enforce tho e fundamental rights.

An affidavit in opposition affirmed by Shri Enayatur Rahman, the present incumbent of the office of respondent 3, has been filed on behalf of the respondents wherein it is maintained that the report contained in the offending publication was not in accordance with the authorised report of the proceedings in the House in that it contained even those remarks which, having been, by order of the Speaker, directed to be expunged, did not form part of the proceedings. It is claimed that generally speaking proceedings in the House are not in the ordinary course of business meant to be published at all and that under no circumstances is it permissible to publish the parts of speeches which had been directed to be expunged and consequently were not contained in the official report. Such publication is said to be a clear breach of the privilege of the Legislative Assembly which is entitled to protect itself by calling the offender to book and, if necessary, by meting out suitable punishment to him. This claim is sought to be founded on the provisions of clause (3) of Article 194 which confers on it all the powers, privileges and immunities enjoyed by the House of Commons of the British Parliament at the commencement of our Constitution.

Learned advocate for the petitioner relies upon Article 19 (1) (*a*) and contends that the petitioner, as a citizen of India, has the right to freedom of speech and expression and that, as an editor of a newspaper, he is entitled to all the benefits of freedom of the Press. It is, therefore, necessary to examine the ambit and scope of liberty of the Press generally and under our Constitution in particular.

In England freedom of speech and liberty of the Press have been secured after a very bitter struggle between the public and the Crown. A short but lucid account of that struggle will be found narrated in the Constitutional History of England by Sir Thomas Erskine May (Lord Farnborough), Vol. II, ch. IX, under the heading "Liberty of Opinion". In the beginning the Church is said to have persecuted the freedom of thought in religion and then the State suppressed it in politics. Matters assumed importance when the art of printing came to be developed. The Press was subjected to a rigorous censorship. Nothing could be published without the imprimatur of the licenser and the publication of unlicensed works was visited with

severe punishments. "Political discussion was silenced by the licenser, the Star Chamber, the dungeon, the pillory, mutilation and branding." Even in the reign of Queen Elizabeth printing was interdicted save in London, Oxford and Cambridge.

"Nothing marked more deeply the tyrannical spirit of the first two Stuarts than their barbarous persecutions of authors, printers and the importers of prohibited books; nothing illustrated more signally the love of freedom than the heroic courage and constancy with which those persecutions were borne."[1]

There was no mention of freedom of speech or of liberty of the Press in the Petition of Rights of 1628. The fall of the Star Chamber augured well for the liberty of the Press, but the respite was shortlived, for the Restoration brought renewed trials upon the Press. The Licensing Act (13 & 14 Chs. 11 C. 33) placed the entire control of the Press in the Government. Liberty of the Press was interdicted and even news could not be published without license. Then came the Revolution of 1688; but even in the Bill of Rights of 1688 there was no mention of freedom of speech or of liberty of the Press. In 1695, however, the Commons refused to renew the Licensing Act and the lapse of that Act marked the triumph of the Press, for thenceforth the theory of free Press was recognised and every writing could be freely published, although at the peril of the rigorous application of the law of libel. William Blackstone in his 4th Book of Commentaries, published in 1769, wrote at page 145:

"The liberty of the Press is indeed essential to the nature of a free State; but this consists in laying no previous restraints upon publication, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the Press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity."

Halam in his Constitutional History of England expresses the same view by saying that liberty of the Press consists merely in exemption from the licenser. To the same effect are the observations of Lord Mansfield, C.J., in *King* v. *Dean of St. Asaph*[2]. The liberty of the Press, therefore, primarily consists in printing without any previous license subject to the consequences of law. It is, in substance, a mere application of the general principle of the rule of law, namely, that no man is punishable except for a distinct breach of the law[3]. It was thus, as a result of a strenuous struggle, that the British people have at long last secured for themselves the greatest of their liberties—the liberty of opinion.

In the United States of America freedom of speech and liberty of the Press have been separately and specifically safeguarded in the Constitutions of most of the different States. Portions of the Constitutions of the 48 federating States, relevant for our purpose, have been collected in Cooley's Constitutional Limitations, Vol. II, ch. 12, pp. 876-880. Fifteen States, only, namely, Alabama, Arizona, Colorado, Idaho, Illinois, Indiana, Kansas, Missouri, Montana, Nebraska, North Dakota, Oregon, South Dakota, Washington and Wyoming do not specifically refer to liberty of the Press but content themselves by providing for freedom of speech. The Constitutions of the rest of the federating States separately, and specifically mention liberty of the Press in addition to freedom of speech. The first Amendment of the Federal Constitution of the United States, which was ratified in 1791, provides that

"Congress shall make no law................abridging the freedom of speech or of the Press".

The Fifth and the Fourteenth Amendments also protect people from being deprived of life, liberty or property without due process of law.

Prior to the advent of our present Constitution, there was no constitutional or statutory enunciation of the freedom of speech of the subjects or the liberty of the Press. Even in the famous Proclamation of Queen Victoria made in 1858 after the British power was firmly established in India, there was no reference to the freedom of speech or the liberty of the Press, although it was announced that

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1. May's Constitutional History of England, Vol. ii, pp. 240-41.
2. (1784) 3 Tr. 428.
3. Dicey's Law of the Constitution, 9th Edn.' p. 247.

"none be in any wise favoured, none molested or disquieted by reason of their Religious Faith or Observances ; but that all shall alike enjoy the equal and impartial protection of the law, ...".

Indeed during the British period of our history the Press as such had no higher or better rights than the individual citizen. In *Arnold* v. *King Emperor*[1] which was a case of an appeal by the editor of a newspaper against his conviction for criminal libel under section 499 of the Indian Penal Code, Lord Shaw of Dunfermline in delivering the judgment of the Privy Council made the following observations at page 169 :—

"Their Lordships regret to find that there appeared on the one side in this case the time-worn fallacy that some kind of privilege attaches to the profession of the Press as distinguished from the members of the public. The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but, apart from statute law, his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful ; but the range of his assertions, his criticisms, or his comments, is as wide as, and no wider than, that of any other subject. No privilege attaches to his position."

Then came our Constitution on January 26, 1950. The relevant portions of Article 19, as it now stands and which is relied on, are as follows :—

"19. (1) All citizens shall have the right—

(*a*) to freedom of speech and expression ;

....

(2) Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court defamation or incitement to an offence."

It will be noticed that this Article guarantees to all citizens freedom of speech and expression but does not specifically or separately provide for liberty of the Press. It has, however, been held that the liberty of the Press is implicit in the freedom of speech and expression which is conferred on a citizen. Thus, in *Romesh Thappar* v. *State of Madras*[2], this Court has held that freedom of speech and expression includes the freedom of propagation of ideas and that freedom is ensured by the freedom of circulation. In *Brijbhushan* v. *The State of Delhi*[3] it has been laid down by this Court that the imposition of pre-censorship on a journal is a restriction on the liberty of the Press which is an essential part of the right to freedom of speech and expression declared by Article 19 (1) (*a*). To the like effect are the observations of Bhagwati, J., who in delivering the unanimous judgment of this Court in *Express Newspapers Ltd.* v. *Union of India*[4], said at page 614 that freedom of speech and expression includes within its scope the freedom of the Press. Two things should be noticed. A non-citizen running a newspaper is not entitled to the fundamental right to freedom of speech and expression and, therefore, cannot claim, as his fundamental right, the benefit of the liberty of the Press. Further, being only a right flowing from the freedom of speech and expression, the liberty of the Press in India stands on no higher footing than the freedom of speech and expression of a citizen and that no privilege attaches to the Press as such, that is to say, as distinct from the freedom of the citizen. In short, as regards citizens running a newspaper the position under our Constitution is the same as it was when the Judicial Committee decided the case of *Arnold* v. *The King Emperor*[1], and as regards non-citizens the position may even be worse.

The petitioner claims that as a citizen and an editor of a newspaper he has the absolute right, subject, of course, to any law that may be protected by clause (2) of Article 19, to publish a true and faithful report of the publicly heard and seen proceedings of Parliament or any State Legislature including portions of speeches directed to be expunged along with a note that that portion had been directed to be

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1. (1914) 26 M.L.J. 621 : L.R. 41 I.A. 149.
2. (1950) S.C.J. 418 : (1950) 2 M.L.J. 390 : (1950) S.C.R. 594.
3. (1950) S.C.J. 425 : (1950) 2 M.L.J. 431 : 1950 S.C.R. 605.
4. (1958) S.C.J. 1113 : A.I.R. 1958 S.C. 578.

so expunged. The respondents before us do not contend that the petitioner's freedom of speech and expression is confined only to the publication of his own sentiments, feelings, opinions, ideas and views but does not extend to the publication of news or of reports of proceedings or of views of others or that such last-mentioned publications are not covered by the interpretation put upon the provisions of Article 19 (1) (*a*) by this Court in the three decisions referred to above or that the case of *Srinivasa* v. *The State of Madras*[1], which apparently supports the petitioner, was wrongly decided. For the purposes of this case, therefore, we are relieved of the necessity for examining the larger questions and have to proceed on the footing that the freedom of speech and expression conferred on citizens includes the right to publish news and reports of proceedings in public meetings or in Parliament or State Legislatures. The respondents, however, deny that the petitioner has the absolute right broadly formulated as hereinbefore mentioned. They urge, *inter alia*, that under Article 194 (3) Parliament and the State Legislatures have the powers, privileges and immunities enjoyed by the House of Commons of British Parliament and those powers, privileges and immunities prevail over the freedom of speech and expression conferred on citizens under Article 19 (1) (*a*).

Besides a few minor miscellaneous points raised by the learned advocate for the petitioner, which will be dealt with in due course, two principal points arising on the pleadings have been canvassed before us and they are formulated thus :

I. Has the House of the Legislature in India the privilege under Article 194 (3) of the Constitution to prohibit entirely the publication of the publicly seen and heard proceedings that took place in the House or even to prohibit the publication of that part of the proceedings which had been directed to be expunged ?

II. Does the privilege of the House under Article 194 (3) prevail over the fundamental right of the petitioner under Article 19 (1) (*a*) ?

Re I : Article 194, on which depends our decision not only on this point but also on the next one, may now be set out :—

"194. (1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Legislature, there shall be freedom of speech in the Legislature of every State.

(2) No member of the Legislature of a State shall be liable to any proceedings in any Court in respect of anything said or any vote given by him in the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of a House of such a Legislature of any report, paper, votes or proceedings.

(3) In other respects, the powers, privileges and immunities of a House of the Legislature of a State, and of the members and the committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution.

(4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of the Legislature of a State or any committee thereof as they apply in relation to members of that Legislature."

This Article, which applies to the State Legislatures and the members and committees thereof, is a reproduction, *mutatis mutandis*, of Article 105 which applies to both Houses of Parliament and the members and committees thereof. It is common ground that the Legislature of the State of Bihar has not made any law with respect to the powers, privileges and immunities of the House of the Legislature as enumerated in Entry 39 of List II of the Seventh Schedule to the Constitution just as Parliament has made no law with respect to the matters enumerated in Entry 74 of List I of that Schedule. Therefore under the latter part of clause (3) of Article 194 the Legislative Assembly of Bihar has all the powers, privileges and immunities enjoyed by the House of Commons at the commencement of our Constitution. What, then, were the powers, privileges and immunities of the House of Commons which are relevant for the purposes of the present petition?

Parliamentary privilege is defined as

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1. (1951) 1 M.L.J. 115: A.I.R. 1951 Mad. 70.

"the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals."[1]

According to the same author "privilege, though part of the law of the land, is to a certain extent an exemption from the ordinary law." The privileges of Parliament are of two kinds, namely: (i) those which are common to both Houses and (ii) those which are peculiar either to the House of Lords or to the House of Commons[2]. The privileges of the Commons, as distinct from the Lords, have been defined as the sum of the fundamental rights of the House and of its individual members as against the prerogatives of the Crown, the authority of the ordinary Courts of law and the special rights of the House of Lords[3]. Learned Solicitor-General appearing for the respondents claims that the Legislative Assembly, like the House of Commons, has the power and privilege, if it so desires, to prohibit totally the publication of any debate or proceedings that may take place in the House and at any rate to prohibit the publication of inaccurate or garbled versions of it. In other words, it is claimed that the House of Commons has the power and privilege to prohibit the publication in any newspaper of even a true and faithful report of its proceedings and certainly the publication of any portion of speeches or proceedings directed to be expunged from the official record.

As pointed out in May's Parliamentary Practice, 16th Edition, p. 151, in the early days of British History the maintenance of its privileges was of vital importance to the House of Commons. They were necessary to preserve its independence of the King and the Lords and, indeed, to its very existence. The privileges of the House of Commons have been grouped under two heads, namely, (i) those demanded of the Crown by the Speaker of the House of Commons at the commencement of each Parliament and granted as a matter of course and (2) those not so demanded by the Speaker. Under the first heading come (*a*) freedom from arrest (claimed in 1554), (*b*) freedom of speech (claimed in 1541), (*c*) the right of access to the Crown (claimed in 1536) and (*d*) the right of having the most favourable construction placed upon its proceedings. The second head comprises (1) the right to provide for the due composition of its own body, (ii) the right to regulate its own proceedings, (iii) the right to exclude strangers, (iv) the right to prohibit publication of its debates and (v) the right to enforce observation of its privileges by fine, imprisonment and expulsion[4]. Admonition and reprimand are milder forms of punishment. The privileges of the House of Commons under the first head are claimed at the commencement of every Parliament by the Speaker addressing the Lord Chancellor on behalf of the Commons. They are claimed as "ancient and undoubted" and are, through the Chancellor "most readily granted and confirmed" by the Crown[5]. Of the three things thus claimed, two, namely, the freedom of the person and the freedom of speech and certain consequential rights like the right to exclude strangers from the House and the control or prohibition of publication of the debates and proceedings are common to both Houses[6].

For a deliberative body like the House of Lords or the House of Commons freedom of speech is of the utmost importance. A full and free debate is of the essence of Parliamentary democracy. Although freedom of speech was claimed and granted at the commencement of every Parliament, it was hardly any protection against the autocratic Kings, for the substance of the debates could be and was frequently reported to the King, and his ministers which exposed the members to the royal wrath. Secrecy of Parliamentary debates was, therefore, considered necessary not only for the due discharge of the responsibilities of the members but also for their personal safety. "The original motive for secrecy of debate was the

1. Sir Thomas Erskine May's Parliamentary Practice, 16th Edn., Ch. III, p. 42.
2. Halsbury's Laws of England, 2nd Edn., Vol. 24, Art. 698, p. 346.
3. Redlich and Ilbert on Procedure of the House of Commons, Vol. 1, p. 46.
4. Ridge's Constitutional Law, 8th Edn., p. 61, also Halsbury's Laws of England, 2nd Edn., Vol. 24, p. 351.
5. Anson's Law and Custom of the Constitution, Vol. 1, Ch. 4, p. 162.
6. Halsbury's Laws of England 2nd Edn., Vol. 24, p. 346.

anxiety of the members to protect themselves against the action of the sovereign, but it was soon found equally convenient as a veil to hide their proceedings from their constituencies "[1]. This object could be achieved in two ways, namely, (*a*) by prohibiting the publication of any report of the debates and proceedings and (*b*) by excluding strangers from the House and holding debates within closed doors. These two powers or privileges have been adopted to ensure the secrecy of debates to give full play to the members' freedom of speech and therefore, really flow, as necessary corollaries, from that freedom of speech which is expressly claimed and granted at the commencement of every Parliament.

As to (*a*) : " The history of Parliamentary privilege is to a great extent a story of the fierce and prolonged struggle of the Commons to win the rights and freedoms which they enjoy to-day "[2]. The right to control and, if necessary, to prohibit the publication of the debates and proceedings has been claimed, asserted and exercised by both Houses of Parliament from very old days. In 1628 and again in 1640 the clerk was forbidden to make notes of "particular men's speeches" or to "suffer copies to go forth of any arguments or speech whatsoever "[3]. The House of Commons of the Long Parliament in 1641 framed a standing order " that no member shall either give a copy or publish in print anything that he shall speak in the House " and "that all the members of the House are enjoined to deliver out no copy or notes of anything that is brought into the House, or that is propounded or agitated in this House". In that critical period it was a necessary a precaution. So strict was the House about this privilege that for printing a collection of his own speeches without such leave, Sir E. Derring was expelled from the House and imprisoned in the Tower and his book was ordered to be burnt by the common hangman. This standing order has not up to this date been abrogated or repealed. In 1680 to prevent inaccurate accounts of the business done, the Commons directed their " votes and proceedings, without any reference to the debates, to be printed under the direction of the Speaker. After the Revolution of 1688, frequent resolutions were passed by both Houses of Parliament from 1694 to 1698 to restrain newsletter writers from " intermeddling with their debates or other proceedings " or " giving any account of minute of the debates ". But such was the craving of the people for political news that notwithstanding these resolutions and the punishment of offenders imperfect reports went on being published in newspapers or journals. Amongst the papers were Boyer's "Political State of Great Britain", "London Magazine" and "Gentleman's Magazine " in which reports of debates were published under such titles as " Proceedings of a Political Club " and " Debates in the Senate of Magna Lilliputia ". In 1722 the House of Commons passed the following resolutions :

> " Resolved, That no News Writers do presume in theirs Letters, or other Papers, that they disperse as Minutes, or under any other Denomination, to intermeddle with the Debates, or any other Proceedings, of this House.
>
> Resolved, That no Printer or Publisher of any printed News Papers, do presume to insert in any such Papers any Debates, or any other Proceedings, of this House, or any Committee thereof." [4].

In 1738 the publication of its proceedings was characterised in another resolution of the House of Commons as " a high indignity and a notorious breach of privilege ". The publication of debates in the " Middlesex Journal " brought down the wrath of the House of Commons on the printers who were ordered to attend the House. The printers not having been found warrants were issued for their arrest and one printer was arrested and brought before Alderman John Wilkes who immediately discharged him on the ground that no crime had been committed. Another printer was arrested and brought before another Alderman who, likewise, discharged the prisoner inasmuch as he was not accused of having committed any crime. By way of reprisal the House of Commons imprisoned the Lord Mayor and

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1. Taswell-Langmead's Constitutional History, 10th Edn., p. 657.
2. Encyclopaedia of Parliament by Norman Widling and Laundy, p. 451.
3. Hatsell 265 quoted in May's Parliamentary Practice 16th Edn., p. 55.
4. 20 Journals of the House of Commons, p. 99 ; quoted in Frank Thayer's Legal Control of the Press, pp. 28-29.

an Alderman, both of whom were the members of the House. Both men, on their release, were honoured in a triumphal procession from the Tower of London to the Mansion House. After this political controversy, debates in both Houses continued to be reported with impunity, although technically such reporting was a breach of privilege. Accurate reporting was, however, hampered by many difficulties, for the reporters had no accommodation in the House and were frequently obliged to wait for long periods in the halls or on the stairways and were not permitted to take notes. The result was that the reports published in the papers were full of mistakes and misrepresentations. After the House of Commons was destroyed by fire in 1834, galleries in temporary quarters were provided for the convenience of reporters, and in the new House of Commons a separate gallery was provided for the Press. In 1836 the Commons provided for the publication of parliamentary papers and reports, which led to the conflict between the House of Commons and the Courts, which was decided in *Stockdale* v. *Hansard*[1], where Lord Chief Justice Denman held that the fact of the House of Commons having directed Messrs. Hansard to publish all their parliamentary reports was no justification for their or for any other bookseller publishing a parliamentary report, containing a libel against any man. Subsequently the House retaliated by committing Stockdale and his attorney and also the sheriff to prison. The deadlock thus brought about was at length removed by the passing of the Parliamentary Papers Act, 1840 (3 and 4 Vic. c. 9).

Learned advocate for the petitioner has drawn our attention to the judgment of Cockburn, C.J., in the celebrated case of *Wason* v. *Walter*[2]. The plaintiff in that case had presented a petition to the House of Lords charging a high judicial officer with having, 30 years before, made a statement false to his own knowledge, in order to deceive a committee of the House of Commons and praying enquiry and the removal of the officer if the charge was found true. A debate ensued on the presentation of the petition and the charge was utterly refuted. Allegations disparaging to the character of the plaintiff had been spoken in the course of the debate. A faithful report of the debate was published in the TIMES and the plaintiff proceeded against the defendant, who was a proprietor of the TIMES, for libel. It was held that the debate was a subject of great public concern on which a writer in a public newspaper had full right to comment, and the occasion was, therefore, so far privileged that the comments would not be actionable so long as a jury should think them honest and made in a fair spirit, and such as were justified by the circumstances as disclosed in an accurate report of the debate. Learned advocate for the petitioner contends that this decision establishes that the Press had the absolute privilege of publishing a report of the proceedings that take place in Parliament, just as it is entitled to publish a faithful and correct report of the proceedings of the Courts of justice, though the character of individuals may incidentally suffer and that the publication of such accurate reports is privileged and entails neither criminal nor civil responsibility.

This argument overlooks that the question raised and actually decided in that case, as formulated by Cockburn, C.J., himself at page 82, was simply this :—

> "The main question for our decision is, whether a faithful report in a public newspaper of a debate in either House of Parliament, containing matter disparaging to the character of an individual, as having been spoken in the course of the debate,is actionable at the suit of the party whose character has thus been called in question."

The issue was between the publisher and the person whose character had been attacked. The question of the privilege, as between the House and the newspaper, was not in issue at all. In the next place, the observations relied upon as bearing on the question of privilege of Parliament were not at all necessary for deciding that case and, as Frank Thayer points out at page 32 of his Legal Control of the Press, " this part of the opinions is purely dictum ". In the third place, the following

1. Moody and Robson, 9, 174 Eng. Rep. 196, also see (1839) 9 A. & E. Reports, Eng. Q.B. 1 : 112 Eng. Rep. 1112.
2. (1868) L.R. 4 Q.B. 73.

observations of the learned Chief Justice clearly indicate that, as between the House and the Press, the privilege does exist :—

"It only remains to advert to an argument urged against the legality of the publication of parliamentary proceedings, namely, that such publication is illegal as being in contravention of the standing orders of both houses of parliament. The fact, no doubt, is, that each house of parliament does, by its standing orders, prohibit the publication of its debates. But, practically each house not only permits, but also sanctions and encourages, the publication of its proceedings, and actually gives every facility to those who report them. Individual members correct their speeches for publication in *Hansard* or the public journals, and in every debate reports of former speeches contained therein are constantly referred to. Collectively, as well as individually, the members of both houses would deplore as a national misfortune the withholding their debates from the country at large. Practically speaking, therefore, it is idle to say that the publication of parliamentary proceedings is prohibited by parliament. The standing orders which prohibit it are obviously maintained only to give to each house the control over the publication of its proceedings, and the power of preventing or correcting any abuse of the facility afforded. Independently of the orders of the houses, there is nothing unlawful in publishing reports of parliamentary proceedings. Practically, such publication is sanctioned by parliament; it is essential to the working of our parliamentary system, and to the welfare of the nation. Any argument founded on its alleged illegality appears to us, therefore, entirely to fail. Should either house of parliament ever be so ill-advised as to prevent its proceedings from being made known to the country—which certainly never will be the case—any publication of its debates made in contravention of its orders would be a matter between the house and the publisher. For the present purpose, we must treat such publication as in every respect lawful, and hold that, while honestly and faithfully carried on, those who publish them will be free from legal responsibility, though the character of individuals may incidentally be injuriously affected."

With the facilities now accorded to the reporters, the practice of reporting has improved, and the House, sensible of the advantage which it derives from a full and clear account of its debates, has even encouraged the publication of reports of debates and proceedings that take place in the House. From this it does not at all follow that the House has given up this valuable privilege. The following passage in Anson's Law and Custom of the Constitution at page 174 is significant and correctly states the position :—

"We are accustomed, therefore, to be daily informed, throughout the Parliamentary Session of every detail of events in the House of Commons ; and so we are apt to forget two things.

The first is, that these reports are made on sufferance, for the House can at any moment exclude strangers and clear the reporter's gallery ; and that they are also published on sufferance, for the House may at any time resolve that publication is a breach of privilege and deal with it accordingly.

The second is, that though the privileges of the House confer a right to privacy of debate they do not confer a corresponding right to the publication of debate."

Frank Thayer at pages 31—32 expresses the same view in the following terms :—

"Parliamentary privilege as part of the unwritten English Constitution is the exclusive right of either House to decide what constitutes interference with its duties, its dignity, and its independence. Its power to exclude strangers so as to secure privacy of debate closely follows the right of Parliament to prevent the publication of debates. Attendance at Parliamentary debates and the publication of debates are by sufferance only, although it is now recognized that dissemination of infromation on debates and Parliamentary proceedings is advantageous to English democracy and, in fact, necessary to public safety. By judicial dictum it has been stated that there is a right to publish fair and accurate report of Parliamentary debates but actually the traditional privilege of Parliament continues in conflict with judicial opinion. There is still a standing order forbidding the publication of Parliamentary debates, an order that by custom and the right of sufferance has become practically obsolete ; yet the threat of such an order and the possibility of a contempt citation for its abuse, should Parliament deem it advantageous to withhold some particular discussion, serve as a check upon careless reporting and distorted comment."

May in his Parliamentary Practice, 16th Edition, page 118 puts the matter thus :

"Analogous to the publication of libels upon either House is the publication of false or perverted or of partial and injurious reports of debates or proceedings of either House or committees of either House or misrepresentations of the speeches of particular members. But as the Commons have repeatedly made orders forbidding the publications of the debates or other proceedings of their House or any committee thereof which, though not renewed in any subsequent session, are considered to be still in force, it has been ruled that an alleged misrepresentation is not in itself a proper matter for the consideration of the House, the right course being to call attention to the report as an infringement of the orders of the House, and then to complain of the misrepresentation as an aggravation of the offence."

The fact that the House of Commons jealously guards this particular privilege is amply borne out by the fact that as late as May 31, 1875, when Lord Hartington sponsored a motion in the House of Commons

"that this House will not entertain any complaint in respect of the publication of the debates or proceedings of the House, or of any committee thereof, except when such debates or any proceedings shall have been conducted within closed doors or when such publication shall have been expressly prohibited by the House or any committee or in case of wilful misrepresentation or other offence in relation to such publication"

the House of Commons rejected the same outright. The conclusion deducible from this circumstance is thus summarised in May's Parliamentary Practice at page 118 :—

"So long as the debates are correctly and faithfully reported, the orders which prohibit their publication are not enforced ; but when they are reported *mala fide* the publishers of newspapers are liable to punishment."

Several instances are given in May's Parliamentary Practice at pages 118-119 where proceedings have been taken for breach of privilege including a case of the publication in 1801 of a proceeding which the House of Lords had ordered to be expunged from the journal. It is said that that was a case of privilege of the House of Lords and not a case of privilege of the House of Commons and it is pointed out that there has been no instance of such a claim of privilege having been made by the House of Commons for over a century. In the first place, it should be remembered that this privilege, as stated in Halsbury's Laws of England, 2nd Edition, Vol. 24, page 351, is a common privilege claimed by both Houses and, if the House of Lords could assert and exercise it in 1801, there is no reason to suppose that the House of Commons will not be able to do so if any occasion arises for its assertion or exercise. If the House of Commons has not done so for a long time it must rather be assumed that no occasion had arisen for the assertion and exercise of this power than that it had ceased to have the power at all. (*Cf.* the observations in *Wason* v. *Walter*[1] and In re *Banwarilal Roy*[2]. Further the fact that the House of Commons in 1875 rejected Lord Hartington's motion referred to above also clearly indicates that the House of Commons is anxious to preserve this particular privilege. It is interesting also to note the new point that arose in the House of Commons regarding the publication of certain proceedings in August, 1947. A Committee of Privileges found that one Mr. Evelyn Walkden, member for Doncaster, had revealed the proceedings of a private party meeting to a newspaper. The Committee thought that the practice of holding party meetings of a confidential character had become well-established and must be taken as a normal and everyday incident of parliamentary procedure. The committee felt that attendance at such meetings within the precincts of the Palace of Westminster during the session was part of the members' normal duties and the publication by the handing out of a report of the proceedings amounted to a breach of the privilege of the House. It is true that the House only resolved that Mr. Walkden was guilty of dishonourable conduct, but did not expel him but it also passed a resolution that in future any person offering payment for the disclosure of such information would incur the House's grave displeasure[3]. In this case the inquiry was with regard to the conduct of a member for having committed a breach of the privilege of the House by publishing the proceedings to an outsider. The point, however, to note is that whatever doubts there might have been as to whether the proceedings of the private party meetings could be equated with the regular proceedings of the House of Commons, there was, nevertheless no question or doubt about the existence of the power or privilege of the House to forbid publication of the proceedings of the House. This case also shows that the House of Commons had not only not abandoned its power or privilege of prohibiting the publication of its proceedings proper but also considered the question of applying this power or privilege to the publication by a member of the proceedings that took place in a private party meeting held within the precincts of the House.

As to (b) : It has already been said that the freedom of speech claimed by the House and granted by the Crown is, when necessary, ensured by the secrecy of the

1. (1868) L. R. 4 . Q.B. 73.
2. 48 C.W.N. 766, 787.
3. Ridge's Constitutional Law, 8th Edn., p. 70 and May's Parliamentary Practice 16th Edn., p. 52.

debate which in its turn is protected by prohibiting publication of the debates and proceedings as well as by excluding strangers from the House. Any member could in the old days "spy a stranger" and the Speaker had to clear the House of all strangers which would, of course, include the Press reporters. This right was exercised in 1849 and after 20 years in 1870 and again in 1872 and 1874. In 1875, however, this rule was modified by a resolution of the House only to this extent, namely, that, on a member spying a stranger, the Speaker would put the matter to the vote of the House[1]. This right was exercised in 1923 and again as late as on November 18, 1958[2]. This also shows that there has been no diminution in the eagerness of the House of Commons to protect itself by securing the secrecy of debate by excluding strangers from the House when any occasion arises. The object of excluding strangers is to prevent the publication of the debates and proceedings in the House, and, if the House is tenaciously clinging to this power or privilege of excluding strangers, it is not likely that it has abandoned its power or privilege to prohibit the publication of reports of debates or proceedings that take place within its precincts.

The result of the foregoing discussion, therefore, is that the House of Commons had at the commencement of our Constitution the power or privilege of prohibiting the publication of even a true and faithful report of the debates or proceedings that take place within the House. *A fortiori* the House had at the relevant time the power or privilege of prohibiting the publication of an inaccurate or garbled version of such debates or proceedings. The latter part of Article 194 (3) confers all these powers, privileges and immunities on the House of the Legislature of the States, as Article 105 (3) does on the Houses of Parliament. It is said that the conditions that prevailed in the dark days of British history, which led to the Houses of Parliament to claim their powers, privileges and immunities, do not now prevail either in the United Kingdom or in our country and that there is, therefore, no reason why we should adopt them in these democratic days. Our Constitution clearly provides that until Parliament or the State Legislature, as the case may be, makes a law defining the powers, privileges and immunities of the House, its members and Committees, they shall have all the powers, privileges and immunities of the House of Commons as at the date of the commencement of our Constitution and yet to deny them those powers, privileges and immunities, after finding that the House of Commons had them at the relevant time, will be not to interpret the Constitution but to re-make it. Nor do we share the view that it will not be right to entrust our Houses with these powers, privileges and immunities, for we are well persuaded that our Houses, like the House of Commons will appreciate the benefit of publicity and will not exercise the powers, privileges and immunities except in gross cases.

Re. II : Assuming that the petitioner, as a citizen and an editor of a newspaper, has under Article 19 (1) (*a*) the fundamental right to publish a true and faithful report of the debates or proceedings that take place in the Legislative Assembly of Bihar and granting that that Assembly under Article 194 (3) has all the powers, privileges and immunities of the House of Commons which include, amongst others, the right to prohibit the publication of any report of the debates of proceedings, whose right is to prevail ? Learned advocate for the petitioner contends that the powers, privileges and immunities of the Legislative Assembly under Article 194 (3) must give way to the fundamental right of the petitioner under Article 19 (1) (*a*). In other words, Article 194 (3) according to him, is subject to Article 19 (1) (*a*).

Learned advocate for the petitioner seeks to support his client's claim in a variety of ways which may now be noted seriatim :—

" (i) that though clause (3) of Article 194 has not, in terms, been made "subject to the provision of the Constitution", it does not necessarily mean that it is not so subject, and that the several clauses of Article 194 or Article 105 should not be treated as distinct and separate provisions but

1. Taswell-Langmead p. 660. 2. The Statesman dated 20th November, 1958.

should be read as a whole and that, so read, all the clauses should be taken as subject to the provisions of the Constitution, which, of course, would include Article 19 (1) (*a*) ;

(ii) that Article 194 (1), like Article 105 (1), in reality operates as an abridgement of the fundamental right of freedom of speech conferred by Article 19 (1) (*a*) when exercised in Parliament or the State Legislatures respectively, but Article 194 (3) does not, in terms, purport to be an exception to Article 19 (1) (*a*) ;

(iii) that Article 19, which enunciates a transcendental principle and confers on the citizens of India indefeasible and fundamental rights of a permanent nature, is enshrined in Part III of our Constitution, which, in view of its subject-matter, is more important, enduring and sacrosanct than the rest of the provisions of the Constitution, but that the second part of Article 194 (3) is of the nature of a transitory provision which, from its very nature, cannot override the fundamental rights ;

(iv) that if, in pursuance of the provisions of Article 105 (3), Parliament makes a law under Entry 74 in List I to the Seventh Schedule defining the powers, privileges and immunities of the House or Houses of Parliament and its members and committees or if, in pursuance of the provisions of Article 194 (3), the State Legislature makes a law under Entry 39 in List II to the Seventh Schedule defining the powers, privileges and immunities of the House or Houses of the Legislature of a State and its members and committees and if, in either case, the powers, privileges and immunities so defined and conferred on the House or Houses are repugnant to the fundamental rights of the citizens, such law will, under Article 13, to the extent of such repugnancy, be void and that such being the intention of the Constitution-makers in the earlier part of Article 194 (3) and there being no apparent indication of a different intention in the latter part of the same clause, the powers, privileges and immunities of the House of Commons conferred by the latter part of clause (3) must also be taken as subject to the fundamental rights ;

(v) that the observations in *Anand Bihari Mishra* v. *Ram Sahay*[1] and the decision of this Court in *Gunapathi Keshavram Reddy* v. *Nafisul Hasan*[2] clearly establish that Article 194 (3) is subject to the fundamental rights."

The arguments, thus formulated, sound plausible and even attractive, but do not bear close scrutiny, as will be presently seen.

Article 194 has already been quoted *in extenso*. It is quite clear that the subject-matter of each of its four clauses is different. Clause (1) confers on the members freedom of speech in the Legislature, subject, of course, to certain provisions therein referred to. Clause (2) gives immunity to the members or any person authorised by the House to publish any report, etc., from legal proceedings. Clause (3) confers certain powers, privileges and immunities on the House of the Legislature of a State and on the members and the committees thereof and finally clause (4) extends the provisions of clauses (1) to (3) to persons who are not members of the House, but who, by virtue of the Constitution, have the right to speak and otherwise to take part in the proceedings of the House or any committee thereof. In the second place, the fact that clause (1) has been expressly made subject to the provisions of the Constitution but clauses (2) to (4) have not been stated to be so subject indicates that the Constitution-makers did not intend clauses (2) to (4) to be subject to the provisions of the Constitution. If the Constitution-makers wanted that the provisions of all the clauses should be subject to the provisions of the Constitution, then the Article would have been drafted in a different way, namely, it would have started with the words : "Subject to the provisions of this Constitution and the rules and standing orders regulating the procedure of the Legislature—" and then the subject-matter of the four clauses would have been set out as sub-clauses (i), (ii), (iii) and (iv) so as to indicate that the overriding provisions of the opening words qualified each of the sub-clauses. In the third place, it may well be argued that the words "regulating the procedure of the Legislature" occurring in clause (1) of Article 194 should be read as governing both "the provisions of the Constitution" and "the rules and standing orders". So read freedom of speech in the Legislature becomes subject to the provisions of the Constitution regulating the procedure of the Legislature, that is to say, subject to the Articles relating to procedure in Part VI including Articles 208 and 211, just as freedom of speech in Parliament under Article 105 (1), on a similar construction, will become subject to the Articles relating to procedure in Part V including Articles 118 and 121. The argument that the whole of Article 194 is subject to Article 19 (1) (*a*) overlooks the provisions of clause

1. A.I.R. 1952 M.B. 31, 43. 2. A.I.R. 1954 S.C. 636.

(2) of Article 194. The right conferred on a citizen under Article 19 (1) (*a*) can be restricted by law which falls within clause (2) of that Article and he may be made liable in a Court of law for breach of such law, but clause (2) of Article 194 categorically lays down that no member of the Legislature is to be made liable to any proceedings in any Court in respect of anything said or any vote given by him in the Legislature or in Committees thereof and that no person will be liable in respect of the publication by or under the authority of the Houses of such a Legislature of any report, paper or proceedings. The provisions of clause (2) of Article 194, therefore, indicate that the freedom of speech referred to in clause (1) is different from the freedom of speech and expression guaranteed under Article 19 (1) (*a*) and cannot be cut down in any way by any law contemplated by clause (2) of Article 19.

As to the second head of arguments noted above it has to be pointed out that if the intention of clause (1) of Article 194 was only to indicate that it was an abridgement of the freedom of speech which would have been available to a member of the Legislature as a citizen under Article 19 (1) (*a*), then it would have been easier to say in clause (1) that the freedom of speech conferred by Article 19 (1) (*a*), when exercised in the Legislature of a State, would in addition to the restriction permissible by law under clause (2) of that Article, be further subject to the provisions of the Constitution and the rules and standing orders regulating procedure of that Legislature. There would have been no necessity for conferring anew the freedom of speech as the words " there shall be freedom of speech in the Legislature of every State " obviously intend to do.

Learned advocate for the petitioner has laid great emphasis on the two parts of the provisions of clause (3) of Article 194, namely, that the powers, privileges and immunities of a House of the Legislature of a State and of the members and Committees thereof shall be as may from time to time be defined by the Legislature by law and that until then they shall be those of the House of Commons of the Parliament of the United Kingdom and of its members and Committees. The argument is that a law defining the powers, privileges and immunities of a House or Houses and the members and Committees thereof can be made by Parliament under Entry 74 in List I and by the State Legislature under Entry 39 of List II and if a law so made takes away or abridges the right to freedom of speech guaranted under Article 19 (1) (*a*) and is not protected under Article 19 (2), it will at once attract the operation of the peremptory provisions of Article 13 and become void to the extent of the contravention of that Article. But it is pointed out that if Parliament or the State Legislature does not choose to define the powers, privileges and immunities and the Houses of Parliament or the House or Houses of the State Legislature or the members and Committees thereof get the powers, privileges and immunities of the House of Commons, there can be no reason why, in such event, the last mentioned powers, privileges and immunities should be independent of and override the provisions of Article 19 (1) (*a*). The conclusion sought to be pressed upon us is that that could not be the intention of the Constitution-makers and, therefore, it must be held that the powers, privileges and immunities of the House of Commons and of its members and Committees that are conferred by the latter part of Article 105 (3) on each House of Parliament and the members and Committees thereof and by the latter part of Article 194 (3) on a House of the Legislature of a State and the members and Committees thereof must be, like the powers, privileges and immunities defined by law, to be made by Parliament or the State Legislature as the case may be, subject to the provisions of Article 19 (1) (*a*). We are unable to accept this reasoning. It is true that a law made by Parliament in pursuance of the earlier part of Article 105 (3) or by the State Legislature in pursuance of the earlier part of Article 194 (3) will not be a law made in exercise of constituent power like the law which was considered in *Sankari Prasad Singh Deo v. Union of India*[1] but will be one made in exercise of its ordinary legislative powers under Article 246 read with the entries referred to above and that consequently if such a law takes away or abridges any of the fundamental rights it will contravene the peremptory provisions of Article 13

1. (1951) S.C.R. 775 : (1951) 2 M.L.J. 683 : (1952) S.C.R. 89, 90.

(2) and will be void to the extent of such contravention and it may well be that that is precisely the reason why our Parliament and the State Legislatures have not made any law defining the powers, privileges and immunities just as the Australian Parliament had not made any under section 49 of their Constitution corresponding to Article 194 (3) up to 1955 when the case of *The Queen* v. *Richards*[1] was decided. It does not, however, follow that if the powers, privileges or immunities conferred by the latter part of those Articles are repugnant to the fundamental rights, they must also be void to the extent of such repugnancy. It must not be overlooked that the provisions of Article 105 (3) and Article 194 (3) are constitutional laws and not ordinary laws made by Parliament or the State Legislatures and that, therefore, they are as supreme as the provisions of Part III. Further, quite conceivably our Constitution makers, not knowing what powers, privileges and immunities Parliament or the Legislature of a State may arrogate and claim for its Houses, members or Committees, thought fit not to take any risk and accordingly made such laws subject to the provisions of Article 13 but that knowing and being satisfied with the reasonableness of the powers, privileges and immunities of the House of Commons at the commencement of the Constitution, they did not, in their wisdom, think fit to make such powers, privileges and immunities subject to the fundamental right conferred by Article 19 (1) (*a*). We must, by applying the cardinal rules of construction ascertain the intention of the Constitution makers from the language used by them. In this connection the observations made in *Anantha Krishnan* v. *State of Madras*[2], by Venkatarama Ayyar, J., appear to us to be apposite and correct :—

> "As against this the learned advocate for the petitioner urges that the fundamental rights are under the Constitution in a paramount position, that under Article 13 the Legislatures of the country have no power to abrogate or abridge them, that the power to tax is the power to destroy and that, therefore, Part 12 is inoperative in respect of the rights conferred under Part III. I am unable to agree. Article 13 on which this argument is mainly founded does not support such a wide contention. It applies in terms only to laws in force before the commencement of the Constitution and to laws to be enacted by the States, that is, in future. It is only those two classes of laws that are declared void as against the provisions of Part III. It does not apply to the Constitution itself. It does not enact that the other portions of the Constitution should be void as against the provisions in Part III and it would be surprising if it did, seeing that all of them are parts of one organic whole. Article 13, therefore cannot be read so as to render any portion of the Constitution invalid. This conclusion is also in accordance with the principle adopted in interpretation of statutes that they should be so construed as to give effect and operation to all portions thereof and that a construction which renders any portion of them inoperative should be avoided. For these reasons I must hold that the operation of Part 12 is not cut down by Part III and that the fundamental rights are within the powers of the taxation by the State."

Article 19 (1) (*a*) and Article 194 (3) have to be reconciled and the only way of reconciling the same is to read Article 19 (1) (*a*) as subject to the latter part of the Article 194 (3), just as Article 31 has been read as subject to Article 265 in the cases of *Ramjilal* v. *Income-tax Officer, Mahindergarh*[3], and *Laxmanappa Hanumantappa* v. *Union of India and another*[4], where this Court has held that Article 31 (1) has to be read as referring to deprivation of property otherwise than by of way taxation. In the light of the foregoing discussion, the observations in the *Madhya Bharat case*[5], relied on by the petitioner, cannot, with respect, be supported as correct. Our decision in *Gunupati Keshavram Reddy* v. *Nafisul Hasan*[6], also relied on by learned advocate for the petitioner, proceeded entirely on a concession of counsel and cannot be regarded as a considered opinion on the subject. In our judgment the principle of harmonious construction must be adopted and so construed, the provisions of Article 19 (1) (*a*), which are general, must yield to Article 194 (1) and the latter part of its clause (3) which are special.

Seeing that the present proceedings have been initiated on a petition under Article 32 of the Constitution and as the petitioner may not be entitled, for reasons stated above, to avail himself of Article 19 (1) (*a*) to support this application, learned

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1. (1955) 92 C.L.R. 57.
2. (1952) S.C.J. 203 : (1951) 1 M.L.J. 384 : (1951) S.C.R. 127.
3. (1952) I.L.R. Mad. 933 : (1952) 1 M.L.J 208 : A.I.R. 1952 Mad. 395, 405.
4. (1955) S.C.J. 590 : (1956) 2 M.L.J. (S.C.). 94 : (1955) 1 S.C.R. 769.
5. A.I.R. 1952 M.B. 31, 43.
6. A.I.R. 1954 S.C. 636.

advocate for the petitioner falls back upon Article 21 and contends that the proceedings before the Committee of Privileges threaten to deprive him of personal liberty otherwise than in accordance with procedure established by law. The Legislative Assembly claims that under Article 194 (3) it has all the powers, privileges and immunities enjoyed by the British House of Commons at the commencement of our Constitution. If it has those powers, privileges and immunities, then it can certainly enforce the same, as the House of Commons can do. Article 194 (3) confers on the Legislative Assembly those powers, privileges and immunities and Article 208 confers power on it to frame rules. The Bihar Legislative Assembly has framed rules in exercise of its powers under that Article. It follows, therefore, that Article 194 (3) read with the rules so framed has laid down the procedure for enforcing its powers, privileges and immunities. If, therefore, the Legislative Assembly has the powers, privileges and immunities of the House of Commons and if the petitioner is eventually deprived of his personal liberty as a result of the proceedings before the Committee of Privileges, such deprivation will be in accordance with procedure established by law and the petitioner cannot complain of the breach, actual or threatened, of his fundamental right under Article 21.

We now proceed to consider the other points raised by learned counsel for the petitioner. He argues that assuming that the Legislative Assembly has the powers, privileges and immunities it claims and that they override the fundamental right of the petitioner, the Legislative Assembly, nevertheless, must exercise those privileges and immunities in accordance with the standing orders laying down the rules of procedure governing the conduct of its business made in exercise of powers under Article 208. Rule 207 lays down the conditions as to the admissibility of a motion of privilege. According to clause (ii) of this rule the motion must relate to a specific matter of recent occurrence. The speech was delivered on May 30, 1957, and Shri Nawal Kishore Sinha, M.L.A., sent his notice of motion on June 10, 1957, that is to say 10 days after the speech had been delivered. The matter that occurred 10 days prior to the date of the submission of the notice of motion cannot be said to be a specific matter of recent occurrence. It is impossible for this Court to prescribe a particular period for moving a privilege motion so as to make the subject-matter of the motion a specific matter of recent occurrence. This matter must obviously be left to the discretion of the Speaker of the House of Legislature to determine whether the subject-matter of the motion is or is not a specific matter of recent occurrence. The copies of the proceedings marked as Annexure D in Annexure III to the petition do not disclose that any objection was taken by any member on the ground that the matter was not a specific matter of recent occurrence. We do not consider that there is any substance in this objection.

Reference is then made to rules 208 and 209 which lay down the procedure as to what is to happen if any objection is taken to leave being granted to the mover to move his motion. It is said that Shri Ramcharitra Sinha, M.L.A., had raised an objection to leave being granted to Shri Nawal Kishore Sinha to move the privilege motion. This allegation in the petition does not appear to be borne out by the account of proceedings in the House to which reference has been made. Shri Ramcharitra Sinha only wanted to know the convention relating to the question of admissibility of such a motion and the Speaker accordingly read out clause (ii) of rule 208. After that Shri Ramcharitra Sinha did not say anything further. The Speaker then said that he understood that there was no opposition in the matter and, therefore, the honourable member was to be understood as having received the leave of the House and called upon him to say what he wanted to say. Thereupon, as stated earlier, Shri Karpuri Thakur wanted to know what had been published in the SEARCHLIGHT of May 31, 1957 and what ought not to have been published. The Speaker thereupon read out the notice submitted by Shri Nawal Kishore Sinha which concisely referred to the subject-matter of the motion and contained a reference to the issue of the SEARCHLIGHT of May 31, 1957, a copy of which was filed along with the notice. After the notice had been read the Speaker permitted Shri Nawal Kishore Sinha to move his privilege motion, which the latter did. There was no amendment proposed and the Speaker then stated what the question before

the House was. Nobody having indicated his opposition, he declared the motion to be carried. There was, in the circumstances, no non-compliance with the provisions of rule 208 read with rule 209.

The next argument founded on non-compliance with the rules is based on rule 215. Clause (i) of that rule provides that the Committee of Privileges should meet as soon as may be after the question has been referred to it and from time to time thereafter till a report is made within the time fixed by the House. In this case the House admittedly did not fix a time within which the report was to be made by the Committee of Privileges. This circumstance immediately attracts the proviso, according to which where the House does not fix any time for the presentation of the report, the report has to be presented within one month of the date on which the reference to the Committee was made. Learned advocate for the petitioner argues that one month's time had long gone past and, therefore, the Committee of Privileges became *functus officio* and cannot, under the rules, proceed with the reference. There is no substance in this contention, because the second proviso to clause (i) of rule 215 clearly provides that the House may at any time on a motion being made direct that the time for the presentation of the report by the Committee be extended to a date specified in the motion. The words " at any time " occurring in the second proviso quite clearly indicate that this extension of time may be within the time fixed by the House or, on its failure to do so, within the time fixed by the first proviso or even thereafter, but before the report is actually made or presented to the House (Cf. *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar*[1]. Further, the question of time within which the Committee of Privileges is to make its report to the House is a matter of internal management of the affairs of the House and a matter between the House and its Committee and confers no right on the party whose conduct is the subject-matter of investigation and this is so particularly when the House has the power to extend time " at any time ".

The next argument is that the Committee cannot proceed to investigate what has not been referred to it. Reference is made to the resolution of the Committee (Annexure II to the petition) and the notice issued to the petitioner (Annexure I to the petition). It is said that while the Committee's resolution speaks of publishing " a perverted and unfaithful report of the proceedings of the Assembly relating to the speech of Maheshwar Prasad Narayan Sinha, M.L.A. " including the expunged portion thereof, the notice simply refers to "a question involving breach of privilege of the Bihar Legislative Assembly arising out of the publication of the news item" and calls upon the petitioner to show cause why appropriate action should not be recommended against him " for breach of privilege of the Speaker and Assembly". We fail to perceive how the two documents can be read as referring to two different charges. The notice served on the petitioner is couched in terms which cover the matters referred to in the Committee's resolution. The effect in law of the order of the Speaker to expunge a portion of the speech of a member may be as if that portion had not been spoken. A report of the whole speech in such circumstances, though factually correct, may, in law, be regarded as perverted and unfaithful report and the publication of such a perverted and unfaithful report of a speech, *i.e.*, including the expunged, portion in derogation to the orders of the Speaker passed in the House may, *prima facie*, be regarded as constituting a breach of the privilege of the House arising out of the publication of the offending news item and that is precisely the charge that is contemplated by the Committee's resolution and which the petitioner is by the notice called upon to answer. We prefer to express no opinion as to whether there has, in fact, been any breach of the privilege of the House, for, of that the House alone is the judge.

The next argument urged by learned advocate for the petitioner is that, after the House had referred the matter to the Committee of Privileges, nothing was done for about one year and after such a lapse of time the Committee has suddenly woke up and resuscitated the matter only with a view to penalise the petitioner. In paragraph 17 of the petition the charge of *mala fides* is thus formulated :—

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1. L.R. (1891) 18 I.A. 55, 58.

"17. That the Committee of Privileges aforesaid is proceeding against the petitioner *mala fides* with a view to victimise and muzzle him since the petitioner has been through his newspaper unsparingly criticising the administration in the State of Bihar of which opposite party No. 1 is the Chief Minister."

It will be noticed that the allegation of *mala fides* is against the Committee of Privileges and not against the Chief Minister and, therefore, to controvert this allegation an affidavit affirmed by the Secretary to the Bihar Legislative Assembly has been filed. In the affidavit in reply reference is made to certain issues of the SEARCHLIGHT indicating that charges were being made by the paper against the Chief Minister and the suggestion is that it is at the instance of the Chief Minister that the Committee has now moved in the matter. This is a new allegation. That apart, the Chief Minister is but one of the fifteen members of the Committee and one of the three hundred and nineteen members of the House. The Committee of Privileges ordinarly includes members of all parties represented in the House and it is difficult to expect that the Committee, as a body, will be actuated by any *mala fide* intention against the petitioner. Further the business of the Committee is only to make a report to the House and the ultimate decision will be that of the House itself. In the circumstances, the allegation of bad faith cannot be readily accepted. It is also urged that the Chief Minister should not take part in the proceedings before the Committee because he has an interest in the matter and reference is made to the decision in *Queen* v. *Meyer*[1]. The case of bias of the Chief Minister (respondent 2) has not been made anywhere in the petition and we do not think it would be right to permit the petitioner to raise this question, for it depends on facts which were not mentioned in the petition but were put forward in a rejoinder to which the respondents had no opportunity to reply.

Finally, the petitioner denies that the expunged portions have been published. We do not think we should express any opinion on this controversy, at any rate, at this stage. If the Legislative Assembly of Bihar has the powers and privileges it claims and is entitled to take proceedings for breach thereof, as we hold it is, then it must be left to the House itself to determine whether there has, in fact, been any breach of its privilege. Thus, it will be for the House on the advice of its Committee of Privileges to consider the true effect of the Speaker's directions that certain portions of the proceedings be expunged and whether the publication of the speech, if it has included the portion which had been so directed to be expunged, is, in the eye of the law, tantamount to publishing something which had not been said and, whether such a publication cannot be claimed to be a publication of an accurate and faithful report of the speech. It will, again, be for the House to determine whether the Speaker's ruling made distinctly and audibly that a portion of the proceedings be expunged amounts to a direction to the Press reporters not to publish the same, and whether the publication of the speech if it has included the portion directed to be so expunged, is or is not a violation of the order of the Speaker and a breach of the privilege of the House amounting to a contempt of the Speaker and the House.

For reasons stated above we think that this petition should be dismissed. In the circumstances, there will be no order for costs.

Subba Rao, J.—I have had the advantage of perusing the well considered judgment of my Lord the Chief Justice. It is my misfortune to differ from him and my learned brethren. I would not have ventured to do so but for my conviction that the reasoning adopted therein would unduly restrict and circumscribe the wide scope and content of one of the cherished fundamental rights, namely, the freedom of speech in its application to the Press.

This is an application under Article 32 of the Constitution for quashing the proceedings before the Committee of Privileges of the Bihar Legislative Assembly and for restraining the respondents, *i.e.*, the Chief Minister of Bihar and the said

1. L.R. (1876) 1 Q.B.D. 173.

Committee of Privileges, from proceeding against the petitioner for the publication in the issue of the SEARCHLIGHT dated May 31, 1957, an account of the debate in the House (The Legislative Assembly, Bihar) on May 30, 1957, and for other incidental reliefs. The petitioner, Pandit M.S.M. Sharma, is the editor of the SEARCHLIGHT, an English daily newspaper, published from Patna in the State of Bihar. On May 30, 1957, Shri Maheswara Prasad Narayan Sinha, a member of the State Assembly made a bitter attack in the Assembly on the Chief Minister, Shri Sri Krishna Sinha, and on Shri Mahesh Prasad Sinha, a Minister in the previous Cabinet, who was defeated at the last general elections. It is said that in regard to that speech the Speaker gave a ruling that certain portions, thereof should be expunged from the proceedings. In the issue of the SEARCALIGHT, dated May 31, 1957, an accurate and faithful account of the proceedings of the Bihar Legislative Assembly of May 30, 1957, was published under the caption "BITTEREST ATTACK ON CHIEF MINISTER". It was also indicated in the report that the Speaker had disallowed the member to name Mr. Mahesh Prasad Sinha in respect of the Ministry-formation and confined him to his remarks in regard to his Chairmanship of the Khadi Board. It is alleged in the affidavit that till May 31, 1957, it was not known to any member of the staff of the SEARCHLIGHT, including the petitioner, that any portion of the debate in question had been expunged from the official record of the Assembly proceedings of May 30, 1957, and that in fact the petitioner did not publish the expunged remarks. This fact was denied by the respondents in their counter, but it was not alleged that the Speaker made any specific order or gave any direction prohibiting the publication of any part of the proceedings of the Assembly in any newspaper. On June 10, 1957, Shri Nawal Kishore Sinha moved a privilege motion in the House and it was carried, as, presumably, no one had opposed it. On the same day, the House referred the matter to the Committee of Privileges without fixing any date for the presentation of the report of the Committee. The Committee in due course held its meeting presided over by the Chief Minister and found that a *prima facie* case of breach of privilege had been made out against the petitioner. Then, the Secretary to the Legislative Assembly issued a notice to the petitioner informing him of the fact that the Committee had found a *prima facie* case of breach of privilege made out against him and asking him to show cause, if any, on or before September 8, 1958, why appropriate action should not be taken against him. Along with that notice, a copy of the motion as adopted by the Committee of Privileges in its meeting held on August 10, 1958, and a copy of a booklet containing a collection of the papers relating to the privilege motion moved by Shri Nawal Kishore Sinha, M.L.A., on June 10, 1957, were enclosed for ready reference. The booklet accompanying the notice contained the motion moved in the House, the report published in the SEARCHLIGHT, dated May 31, 1957, and the rules of the Assembly relating to the Committee of Privileges. Though there was some argument on the construction of the terms of the resolution passed by the Committee on account of the unhappy language in which it was couched, it is manifest that the breach of privilege pleaded was that the petitioner, by including the expunged portion of the speech of Maheshwar Prasad Narayan Sinha, published a perverted and unfaithful report of the proceedings of the Assembly. The petitioner, thereafter, filed a petition under Article 32 of he Constitution for the aforesaid reliefs.

On the aforesaid facts, the learned counsel for the petitioner raised the following points in support of the petition : (1) The petitioner, as a citizen of India, has the fundamental right under Article 19 (1) of the Constitution to freedom of speech and expression, which includes the freedom of propagation of ideas and their publication and circulation ; and the Legislature of a State cannot claim a privilege in such a way as to infringe that right. This contention is put in two ways : (i) The privilege conferred on the Legislature of a State is subject to the freedom conferred on a citizen under Article 19 (1) of the Constitution ; and (ii) that even if the privilege was not expressly made subject to the fundamental right under Article 19 (1), having regard to the nature of the fundamental right and the rules of interpretations this Court should so construe the provisions as to give force to both the provisions, (2) Even if Article 194 (3) overrides the provisions of Article 19, the powers, privileges

and immunities of the House of Legislature are only those of the House of Commons of the Parliament of the United Kingdom, at the commencement of the Constitution, *i.e.*, January 26, 1950; and the House of Commons on that date had no privilege to prevent the publication of its proceedings or portion expunged by the Speaker in respect of the proceedings. (3) Under Article 21 of the Constitution, no person is to be deprived of his personal liberty except in accordance with the procedure established by law and that the Privilege Committee, by calling upon the petitioner to appear at the bar of the Legislature after making an enquiry in violation of the rules, particularly the rules 207 (2), 208 (3) and 215 of the Rules of the Assembly relating to the Committee of Privileges, has infringed his right under that Article. (4) Mr. Maheshwara Prasad Narayan Sinha made a bitter attack on the Chief Minister and that report was published in the SEARCHLIGHT. The Chief Minister, who has admittedly control over the Legislature or at any rate over the majority of the members of the Assembly, was actuated by *mala fides* in securing the initiation of the proceedings against the petitioner for breach of privilege, and therefore his presiding over the meeting of the Sub-Committee would vitiate its entire proceedings. (5) The Committee of Privileges enquired into an allegation not referred to it by the House. The learned Solicitor-General, appearing for the respondents, countered the said arguments and his contentions may be summarised thus: Under the Constitution, no particular Article has more sanctity than the other, even though that Article deals with fundamental rights. Article 194 (3) is not made subject to Article 19 of the Constitution, and, therefore, if the House of Commons of the Parliament of the United Kingdom has the power or privilege to prevent the publication of its proceedings, or at any rate of the expunged portions of it, the Legislature of a State in India has also a similar privilege or power and it can exercise it, notwithstanding the fact that it infringes the fundamental right of a citizen. The House of Commons of the United Kingdom has such a privilege and therefore the Legislature of Bihar can exercise it and take action against the person committing a. breach thereof. While a Court of Law can decide on the question of the existence and the extent of the privilege of a House, it has no power or jurisdiction to consider whether a particular person in fact committed a breach thereof. The Legislature in this case has not broken any of the rules of the Assembly relating to the Committee of Privileges, and even if it did, by reason of Article 212 (1) of the Constitution, the validity of its proceedings cannot be questioned on the ground of any alleged irregularity of the procedure. There was no allegation in the petition that the Committee or the Assembly was actuated by *mala fides* and even if the Chief Minister was acting with *mala fides*—which fact was denied—, the proceedings of the Committee or of the Legislature, which is the final authority in the matter of deciding whether there was a breach of privilege, would not be vitiated. It was also denied that the Committee of Privileges enquired into any allegation not referred to it by the House.

At the outset it would be convenient to clear the ground of the subsidiary ramifications falling outside the field of controversy and focus on the point that directly arises in this case. We are not concerned here with the undoubted right of a State Legislature to control and regulate its domestic affairs. In "Cases in Constitutional Law" by Keir and Lawson, it is stated, at page 126, as follows:

"The undoubted privileges of the House of Commons are of three kinds. They include (i) exclusive jurisdiction over all questions which arise within the walls of the house, except, perhaps in case of felony..

(ii) Certain personal privileges which attach to members of Parliament. The most important of these are freedom of debate, and immunity from civil arrest during the sitting of Parliament and for forty days before and after its assembling....................'That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament.'

(iii) The power of executing decisions on matters of privilege by committing members of Parliament, or any other individuals, to imprisonment for contempt of the House."

Nor we are called upon to decide on the scope of a Court's jurisdiction to set aside the orders of contempt made by the Legislature or warrants issued to implement the said orders. Reported decisions seem to suggest that if the order committing a

person for contempt or the warrant issued pursuant thereto discloses the reasons, the Court can decide whether there is a privilege and also its extent; but, when it purports to issue a bald order, the Court has no power to decide, on the basis of other evidence, whether in fact a breach of privilege is involved. As this question does not arise in this case. I need not express any opinion thereon. The stand taken by the Legislature, as disclosed in the notice issued, the enclosed records sent to the petitioner, in the counter-affidavit filed and the arguments advanced by the respondents, is that the Legislature of a State has the privilege to prevent any citizen from publishing the proceedings of the Legislature or at any rate such portions of it as are ordered to be expunged by the Speaker, and therefore it has a right to take action against the person committing a breach of such a privilege. The main question, therefore, that falls to be decided is whether the Legislature has such a privilege. If this question is answered against the Legislature, no other question arises for consideration.

The powers, privileges, and immunities of a State Legislature are governed by Article 194 of the Constitution and the freedom of propagation of ideas, their publication and circulation by Article 19 (1) (*a*) thereof. For convenience of reference, both these articles may be read in juxtaposition.

Article 19 reads:

> "(1) All citizens shall have the right—
>
> (*a*) to freedom of speech and expression;
>
> ....
>
> (2) Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence."

Article 194 states:

> "(1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Legislature, there shall be freedom of speech in the Legislature of every State.
>
> (2) No member of the Legislature of a State shall be liable to any proceedings in any Court in respect of anything said or any vote given by him in the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of a House of such a Legislature of any report, paper, votes or proceedings.
>
> (3) In other respects, the powers, privileges and immunities of a House of the Legislature of a State, and of the members and the committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution.
>
> (4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of a House of the Legislature of a State or any committee thereof as they apply in relation to members of that Legislature."

In *Romesh Thappar* v. *The State of Madras*[1], this Court ruled that freedom of speech and expression includes freedom of propagation of ideas and that freedom is ensured by the freedom of circulation. This freedom is, therefore, comprehensive enough to take in the freedom of the press. The said view is accepted and followed in *Brij Bhushan* v. *The State of Delhi*[2]. To the same effect is the decision of this Court in *Express Newspapers Ltd.* v. *Union of India*[3], where Bhagwati, J., delivering the judgment of the Court, held that freedom of speech and expression includes within its scope the freedom of the Press. In *Srinivasan* v. *The State of Madras*[4], it was held, on the basis of the view expressed by this Court, that the terms "freedom of speech and expression" would include the liberty to propagate not only one's own views but also

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1. (1950) S.C.J. 418 : (1950) 2 M.L.J. 390 : (1950) S.C.R. 594.
2. (1950) S.C.J. 425 : (1950) 2 M.L.J. 431 : 1950 S.C.R. 605.
3. (1958) S.C.J. 1113 : A.I.R. 1958 S.C. 578, 614.
4. (1951) 1 M.L.J. 115 : A.I.R. 1951 Mad. 70.

the right to print matters which are not one's own views but have either been borrowed from someone else or are printed under the direction of that person. I would, therefore, proceed to consider the argument advanced on the basis that the freedom of speech in Article 19 (1) (*a*) takes in also the freedom of the Press in the comprehensive sense indicated by me *supra*. The importance of the freedom of speech in a democratic country cannot be over-emphasized, and in recognition thereof, clause (2) of Article 19, unlike other clauses of that Article, confines the scope of the restrictions on the said freedom within comparatively narrower limits. Clause (2) enables the State to impose reasonable restrictions on the exercise of the said right in the interest of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence. The said Article finds place in Part III under the heading "Fundamental Rights". Article 13 makes laws that are inconsistent with or in derogation of the fundamental rights void and clause (2) thereof expressly prohibits the State from making laws in contravention of the said rights. In the words of Patanjali Sastri, C.J., the said rights in Part III are "rights reserved by the people after delegation of the rights by the people to the institutions of Government." It is true, and it cannot be denied, that notwithstanding the transcendental nature of the said rights, the Constitution may empower the Legislature to restrict the scope of the said rights within reasonable bounds, as in fact it did under clauses (2) to (6) of Article 19. Such restrictions may be by express words or by necessary implication. But the Court would not and should not, having regard to the nature of the rights, readily infer such a restriction unless there are compelling reasons to do so. The Constitution adopted different and well-understood phraseology to resolve conflicts and prevent overlapping of various provisions. Some Articles are expressly made subject to the provisions of the Constitution—*vide* Articles 71 (3), 73 (1), 105, 131, etc.—and some to specified Articles —*vide* Articles 81, 107 (1), 107 (2), 114 (3), 120 (1), etc. Some Articles are made effective notwithstanding other provisions in the Constitution—*vide* Articles 120 (1), 136 (1), 143 (2), 169 (1), etc. Where the Constitution adopts one or other of the said two devices, its intention is clear and unambiguous ; but, there are other Articles which are not expressly made subject to provisions of the Constitution or whose operation is not made effective notwithstanding any other provisions. In such cases, a duty is cast upon the Court to ascertain the intention of the Constitutent Assembly. Cooley in his "Constitutional Law" points out that " however carefully constitutions may be made, their meaning must be often drawn in question". He lays down, at page 427, the following rule, among others, as a guide to the construction of these instruments :

> " The whole instrument is to be examined, with a view of determining the intention of each part Moreover, effect is to be given, if possible, to the whole instrument, and to every section and clause. And in interpreting clauses it must be presumed that words have been used in their natural and ordinary meaning."

The rule may also be stated in a different way : If two Articles appear to be in conflict, every attempt should be made to reconcile them or to make them to co-exist before excluding or rejecting the operation of one.

Article 194 (3) of the Constitution, with which we are concerned, does not in express terms make that clause subject to the provisions of the Constitution or to those of Article 19. Article 194 has three clauses. The first clause declares that there shall be freedom of speech in the Legislature of every State and that freedom is expressly made subject to the provisions of the Constitution and to the rules and the standing orders regulating the procedure of the Legislature. Clause (2) gives protection to members of the Legislature of a State from any liability to any proceedings in any Court in respect of anything said or any vote given by him in the Legislature or any committee thereof and to every person in respect of the publication by or under the authority of a House of such a Legislature of any report, paper, votes or procedure. The third clause, with which we are now directly concerned, confers upon a House of the Legislature of a State and of the members and the committees thereof certain powers, privileges and immunities. It is in two parts. The first part says that the powers, privileges and immunities of a House of the Legislature of a

State and of the members and the committees of a House of such Legislature shall be such as may from time to time be defined by the Legislature by law ; and the second part declares that until so defined, they shall be those of the House of Commons of the Parliament of the United Kingdom and its members and committees, at the commencement of the Constitution. The question is whether this clause confers on the Legislature powers, privileges and immunities so as to infringe the fundamental right of a citizen under Article 19 (1) (*a*) of the Constitution. The first thing to be noticed is that while Article 19 (1) (*a*) of the Constitution deals with the freedom of speech and expression of a citizen, Article 194 (1) declares that there shall be freedom of speech in the Legislature of every State. While Article 19 (1) is general in terms and is subject only to reasonable restrictions made under clause (2) of the said Article, Article 194 (1) makes the freedom of speech subject to the provisions of the Constitution and rules and standing orders regulating the procedure of the Legislature. Clause (2) flows from clause (1) and it affords protection from liability to any proceedings in a Court for persons in respect of the acts mentioned therein. But these two provisions do not touch the fundamental right of a citizen to publish proceedings which he is entitled to do under Article 19 (1) of the Constitution. That is dealt with by clause (3). That clause provides for powers, privileges and immunities of a House of the Legislature of a State and of the members and the committees of a House, other than those specified in clause (2). It is not expressly made subject to the provisions of the Constitution. I find it difficult to read in that clause the opening words of clause (1), *viz.*, "subject to the provisions of this Constitution", for two reasons : (i) clause (3) deals with a subject wider in scope than clause (1) and therefore did not flow from clause (1) ; and (ii) grammatically it is not possible to import the opening words of clause (1) into clause (3). Therefore, I shall proceed on the basis that clause (3) is not expressly made subject to Article 19 or expressly made independent of other Articles of the Constitution. We must, therefore scrutinize the provisions of that clause in the context of the other provisions of the Constitution to ascertain whether by necessary implication it excludes the operation of Article 19. The first thing to be noticed in clause (3) of Article 194 is that the Constitution declares that the powers, privileges and immunities of a House of Legislature of State and of the members and committees of a House of such Legislature are such as defined by the Legislature by law. In the second part, as a transitory measure, it directs that till they are so defined, they shall be those of the House of Commons of the Parliament of the United Kingdom and of its members and committees, at the commencement of the Constitution. I find it impossible to accept the contention that the second part is not a transitory provision ; for, the said argument is in the teeth of the express words used therein. It is inconceivable that the Constituent Assembly, having framed the Constitution covering various fields of activity in minute detail, should have thought fit to leave the privileges of the Legislatures in such a vague and nebulous position compelling the Legislatures to ascertain the content of their privileges from those obtaining in the House of Commons at the commencement of the Constitution. The privilege of the House of Commons is an organic growth. Sometimes a particular rule persists in the record but falls into disuse in practice. Privileges, just like other branches of common law, are results of compromise depending upon the particular circumstances of a given situation. How difficult it is to ascertain the privilege of the House of Commons and its content and extent in a given case is illustrated by this case.

Reliance is placed upon other Articles of the Constitution in support of the contention that the second part of clause (3) is not intended to be transitory in nature. Under Article 135 of the Constitution, until Parliament by law otherwise provides the Supreme Court shall have certain appellate jurisdiction. Under Article 137, subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it. Article 142 (2) says :

"Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respect the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself."

Article 145 reads :

"Subject to the provisions of any law made by Parliament, the Supreme Court may from time to time, with the approval of the President, make rules for regulating generally the practice and procedure of the Court. . . . ."

Under Article 146 (2) :

"Subject to the provisions of any law made by Parliament, the conditions of service of officers and servants of the Supreme Court shall be such as may be prescribed by rules made by the Chief Justice of India or by some other Judge or officer of the Court authorised by the Chief Justice of India to make rules for the purpose."

Under Article 187 (3) :

"Until provision is made by the Legislature of the State under clause (2), the Governor may, after consultation with the Speaker of the Legislative Assembly or the Chairman of the Legislative Council, as the case may be, make rules regulating the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the Assembly or the Council, and any rules so made shall have effect subject to the provisions of any law made under the said clause."

Clause (2) of Article 210 says :

"Unless the Legislature of the State by law otherwise provides, this article shall, after the expiration of a period of fifteen years from the commencement of this Constitution, have effect as if the words 'or in English' were omitted therefrom."

I do not see any analogy between the first part of Article 194 (3) and the provisions of the aforesaid Articles. Firstly, the said Articles do not import into India the law of a foreign country ; secondly, they either make the existing law subject to the provisions of any law made by Parliament, or declare a particular law to be in force unless modified by Parliament ; whereas in Article 194 (3) the Constitution expressly declares that the law in respect of powers, privileges and immunities is that made by a House of the Legislature from time to time and introduces a rider as a transitory measure that till such law is made, the powers, privileges and immunities of the House of Commons should be those of the Legislature also. I have no doubt, therefore, that part two of clause (3) of Article 194 is intended to be a transitory provision and ordinarily, unless there is a clear intention to the contrary, it cannot be given a higher sanctity than that of the first part of clause (3). The first part of clause (3) reads :

"In other respects, the powers, privileges and immunities of a House of the Legislature of a State, and of the members and the committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law. . . . ."

Article 245 enables a State to make laws for the whole or any part of the State. Article 246 (3) provides that the Legislature of any State has exclusive power to make laws with respect to any of the matters enumerated in List II in the Seventh Schedule (in the Constitution referred to as the "State List"). Item 39 of List II of the Seventh Schedule enumerates the following matters among others :

"Powers, privileges and immunities of the Legislative Assembly and of the members and the committees thereof. . . . ."

Clause (2) of Article 13, which is one of the Articles in Part III relating to fundamental rights, prohibits the State from making any law which takes away or abridges the rights conferred by that Part and declares that any law made in contravention of that clause shall to the extent of the contravention be void. It is, therefore, manifest that the law made by the Legislature in respect of the powers, privileges and immunities of a House of the Legislature of a State, would be void to the extent the law contravened the provisions of Article 19 (1) (*a*) of the Constitution, unless it is saved by any law prescribing reasonable restrictions within the ambit of Article 19 (2). So much is conceded by the learned Solicitor-General. Then what is the reason or justification for holding that the second part of that clause should be read in a different way as to be free from the impact of the fundamental rights. When the Constitution expressly made the laws prescribing the privileges of the Legislature of a State of our country subject to the fundamental rights, there is no apparent reason why they should have omitted that limitation in the case of the privileges of the Parliament of the United Kingdom in their application to a State Legislature. We

cannot assume that the framers of the Constitution thought that the privileges of the House of Commons were subject to the fundamental rights in that country ; for, to assume that is to impute ignorance to them of the fact that the Parliament of the United Kingdom was supreme and there were no fetters on its power of legislation. The contention also, if accepted, would lead to the anomaly of a law providing for privileges made by Parliament or a Legislature of our country being struck down as infringing the fundamental rights, while the same privilege or privileges, if no law was made, would be valid. Except the far-fetched suggestion that the Constitution-makers might have thought that all the privileges of the House of Commons, being the mother of Parliaments, would not in fact offend the fundamental rights and that, therefore, they designedly left them untouched by Part III as unnecessary or the equally untenable guess that they thought that for a temporary period the operation and the extent of the said privileges need not be curtailed, no convincing or even plausible reason is offered for the alleged different treatment meted out to the said privileges in the said two parts of clause (3). If the Constitution intended to make the distinction, it would have opened the second part of clause (3) with the words.

"Notwithstanding other provisions of the Constitution or those of Article 19."

I cannot also appreciate the argument that Article 194 should be preferred to Article 19 (1) and not *vice versa.* Under the Constitution, it is the duty of this Court to give a harmonious construction to both the provisions so that full effect may be given to both, without the one excluding the other. There is no inherent inconsistency between the two provisions. Article 19 (1) (*a*) gives freedom of speech and expression to a citizen, while the second part of Article 194 (3) deals with the powers, privileges and immunities of the Legislature and of its members and committees. The Legislature and its members have certainly a wide range of powers and privileges and the said privileges can be exercised without infringing the rights of a citizen, and particularly of one who is not a member of the Legislature. When there is a conflict, the privilege should yield to the extent it affects the fundamental right. This construction gives full effect to both the Articles. This Court in *Gunupati Keshavaram Reddy* v. *Nafisul Hasan*[1], held that the order of arrest of Mr. Mistry and his detention in the Speaker's custody was a breach of the provisions of Article 22 (2) of the Constitution. In that case, the said Mistry, was directed by the Speaker of the U.P. Legislative Assembly to be arrested and produced before him to answer a charge of breach of privilege. Though the question was not elaborately considered, five Judges of this Court unanimously held that the arrest was a clear breach of the provisions of Article 22 (2) of the Constitution indicating thereby that Article 194 was subject to Articles of Part III of the Constitution. I am bound by the decision of this Court. In the result, I hold that the petitioner has the fundamental right to publish the report of the proceedings of the Legislature and that, as no reasonable restrictions were imposed by law on the said fundamental right, the action of the respondents infringes his right entitling him to the relief asked for.

This case does not, as it is supposed or suggested illustrate any conflict between the Legislature and the Court, but it is one between the Legislature and the citizens of the State whose representatives constituted the Legislature. I yield to none in my respect for that august body, the Legislature of the State ; but, we are under a duty, enjoined on this Court by Article 32 of the Constitution, to protect the rights of the citizens who in theory reserved to themselves certain rights and parted only the others to the Legislature. Every institution created by the Constitution, therefore, should function within its allotted field and cannot encroach upon the rights of the people who created the institutions. It may not be out of place to suggest to the appropriate authority to make a law regulating the powers, privileges and immunities of the Legislature instead of keeping this branch of law in a nebulous state, with the result that a citizen will have to make a research into the unwritten law of the privileges of the House of Commons at the risk of being called before the Bar of the Legislature.

1. A.I.R. 1954 S.C. 636.

The said conclusion would be sufficient to dispose of this petition. But as it was argued at some length, it would be as well that I expressed my opinion on the question of the existence and the extent of the relevant privileges of the House of Commons at the commencement of the Constitution. Before considering that question, it would be convenient to notice briefly the scope of a Court's jurisdiction to investigate the nature and the extent of the privilege claimed by the House of Commons. It is often said that each House of Parliament is the sole Judge of its own vileges. But early in the history of British Parliament the question of the scope of that equivocal statement was raised and it was contended that the House's jurisdiction was confined only within the limits of the privileges as defined by the Courts of Common Law. The said question was raised and decided in *Ashby* v. *White*[1], *Paty's Case*[2], *Stockdale* v. *Hansard*[3] and the *Case of the Sheriff of Middlesex*[4]. In the said case, the Common Law rights of a citizen were threatened by the House of Commons on the ground that the person concerned committed a breach of the privilege of the House. The combined effect of these decisions is that " the Courts deny to the Houses the right to determine the limits of their privileges, while allowing them within those limits exclusive jurisdiction". In Anson's Law and Custom of the Constitution, the principle has been neatly stated, at page 190, thus :

" The Privileges of Parliament, like the prerogative of the Crown, are rights conferred by law, and as such their limits are ascertainable and determinable, like the limits of other rights, by the Courts of Law."

As the learned Solicitor-General conceded the said legal position, it would be unnecessary to pursue the matter further or consider the decisions in greater detail.

The main question, therefore, that falls to be decided is the existence and the extent of the privilege claimed by the respondents. As the privilege claimed by the respondents is in derogation of the fundamental right of a citizen, the burden lies heavily upon them to establish by clear and unequivocal evidence that the House of Commons possessed such a privilege. In the words of Coke :

" as the privilege is part of the law of custom of the Parliament, they must be collected out of the rolls of Parliament and other records and by precedent and continued experience."

They can be found only in the Journals of the House compiled in the Journal Office from the manuscript minutes and notes of proceedings made by the clerks at the table during the sittings of the House. Decided cases and the text-books would also help us to ascertain the privileges of the Houses. The words "at the commencement of the Constitution" indicate that the privileges intended to be attracted are not of the dark and difficult days, when the House of Commons passed through strife and struggle, but only those obtaining in 1950, when it was functioning as a model Legislature in a highly democratized country. In the circumstance, a duty is cast upon the respondents to establish with exactitude that the House of Commons possessed the particular privilege claimed at the commencement of the Constitution.

The respondents claimed two privileges : (i) that the House of Commons has the privilege of preventing the publication of its proceedings and (ii) that it has the privilege to prevent the publication of that part of the proceedings directed by the Speaker to be expunged. Indeed the second privilege is in fact comprehended by the first, which is larger in scope.

A history of the said privilege is given in May's Parliamentary Practice as well as in Halsbury's Laws of England. In Halsbury's Laws of England, 2nd edition, Volume 24 (Lord Hailsham's Edition), it is stated at pages 350-351 as follows :

" It is within the power of either House of Parliament, should it deem it expedient, to prohibit the publication of its proceedings.

In the House of Lords, it is a breach of privilege for any person to print or publish anything relating to the proceedings of the House without its permission. The House of Commons, upon many occasions, has declared the publication of its proceedings without the authority of the House to be a breach of privilege, and the House has never formally rescinded the orders which from time to time it has made with regard to this subject. At the present time, however, neither House will consider a report of its

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1. (1703) 2 Ld. Raym. 938.
2. (1704) 2 Ld. Raym. 1105.
3. (1839) 9 A. & E. 1.
4. (1840) 11 A. & E. 809.

proceedings in a newspaper or other publication to be a breach of its privileges, unless such report is manifestly inaccurate or untrue."

At page 350 in the foot-note (*d*) the history of the said privilege is given thus :

"The jealousy of the House of Commons with regard to the privacy of its proceedings dates from the Long Parliament, and was due to the antagonism which existed between that assembly and the King. The object of the House at that time was to prevent its own members or officers from supplying the King with information which might incriminate its members ; see Resolutions of the House of Commons of 13th July, 1641 (Journals of the House of Commons, 1641, Vol. II, page 209). It was not until after the Revolution of 1689 that the House came in contact with unofficial reporters who urnished, for the news letters of the day, reports, often prejudicial and generally inaccurate, of the proceedings of the Commons. In 1738 the House passed a resolution stating that it was "a high indignity to, and a notorious breach of privilege of, this House, for any news writer, in letters or other papers (as minutes, or under any other denomination), or for any printer or publisher of any printed newspaper of any denomination to insert in the said letters or papers, or to give therein an account of the debates or other proceedings of this House or any committee thereof, as well during the recess, as the sitting of Parliament ; and that this House will proceed with the utmost severity against such offenders (Journals of the House of Commons, 1738, Vol. XXIII, p. 148 ; Parliamentary History, Vol. X, pp. 799-811). This resolution was repeated in 1753 and 1762 ; see Journals of the House of Commons, 1753, Vol. XXVI, p. 754 ; 1762, Vol. XXIX, pp. 206, 207. But, in spite of the attitude of the House, unofficial reports of the proceedings of the House of Commmons were still published, and in 1771, during the disturbances caused by John Wilkes, the claim of the House to forbid the publication of its debates led to a struggle between the Commons and the City of London which, although it resulted in the committal to prison of the Lord Mayor and two aldermen, practically put an end to the attenpts of the House of Commons to prevent the publication of its debates."

Much to the same effect it is stated in May's Parliamentary Practice : at page 54, the learned author, under the heading "Right to Control Publication of Debates and Proceedings", observes :

"Closely connected with the power to exclude strangers, so as to obtain, when necessary, such privacy as may secure freedom of debate, is the right of either House to prohibit the publication of debates or proceedings. The publication of the debates of either House has been repeatedly declared to be a breach of privilege, and especially false and perverted reports of them ; and no doubt can exist that if either House desire to withhold their proceedings from the public, it is within the strictest limits of their jurisdiction to do so, and to punish any violation of their orders."

After tracing the history of the privilege, the practice obtaining in modern times is described thus :

"The repeated orders made by the House forbidding the publication of the debates and proceedings of the House, or of any committee thereof, and of comments thereon, or on the conduct of Members in the House, by newspapers, newsletters, or otherwise, and directing the punishment of offenders against such rules, have long since fallen into disuse. Indeed, since 1909, the debates have been reported and issued by an official reporting staff under the authority of Mr. Speaker, and are sold to the public by Her Majesty's Stationery Office."

The same idea is repeated at page 56 as follows :—

"So long as the debates are correctly and faithfully reported, however, the privilege which prohibits their publication is waived."

At page 118, the same result is described in different words thus :

"So long as the debates are correctly and faithfully reported, the orders which prohibit their publication are not enforced ; but when they are reported *mala fide*, the publishers of newspapers are liable to punishment."

Then the following eight instances of misconduct in connection with the publication of the debates which is generally treated as a breach of privilege of the House are given by the learned author :

"(i) Publishing a false account of proceedings of the House of Lords ;

(ii) Publishing scandalous misrepresentation of what had passed in either House or what had been said in debate ;

(iii) Publishing gross or wilful misrepresentations of particular Members' speeches ;

(iv) Publishing under colour of a report of a Member's speech a gross libel on the character and conduct of another Member ;

(v) Suppressing speeches of particular Members ;

(vi) Publishing a proceeding which the House of Lords had ordered to be expunged from the Journals ;

(vii) Publishing a libel on counsel appearing before a committee under colour of a report of the proceedings of such committee ; and

(viii) Publishing a forged paper, publicly sold as His Majesty's speech to both Houses."

It would be seen from the instances that *mala fides* is a necessary ingredient of the publication to attract the doctrine of privilege and that the instances given are of the period between 1756 to 1893. One of the instances on which strong emphasis is laid by the learned Solicitor-General is the publishing of a proceeding which the House of Lords had ordered to be expunged from the Journals. Apart from the fact that the instance in question relates to the House of Lords, the Journal is not available for us to ascertain under what circumstances the publication was made. Further the instance was of the year 1801 and no other instances of that kind appear to have occurred from 1801 to 1950. In the circumstances, on the authority of May, it may be accepted that the House of Lords asserted the privilege in 1801 when its proceedings were published *mala fide*, though they were expressly ordered to be expunged.

Cockburn, C.J., in *Wasan* v. *Walter*[1], forcibly pointed out the irrelevance of the privilege claimed in the modern democratic set up. At page 89, the learned Chief Justice observed :

"It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the Houses of Parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls, seeing that on what is there said and done, the welfare of the community depends. Where would be our confidence in the government of the country or in the legislature by which our laws are framed, and to whose charge the great interests of the country are committed,—where would be our attachment to the Constitution under which we live,—if the proceedings of the great council of the realm were shrouded in secrecy and concealed from the knowledge of the nation ? How could the communications between the representatives of the people and their constituents, which are so essential to the working of the representative system, be usefully carried on, if the constituencies were kept in ignorance of what their representatives are doing ? What would become of the right of petitioning on all measures pending in Parliament, the undoubted right of the subject, if the people are to be kept in ignorance of what is passing in either House ? Can any man bring himself to doubt that the publicity given in modern times to what passes in Parliament is essential to the maintenance of the relations subsisting between the Government, the legislature and the country at large ? It may, no doubt, be said that, while it may be necessary as a matter of national interest that the proceedings of Parliament should in gěneral be made public, yet that debates in which the character of individuals is brought into question ought to be suppressed. But to this, in addition to the difficulty in which parties publishing Parliamentary reports would be placed, if this distinction were to be enforced and every debate had to be critically scanned to see whether it contained defamatory matter, it may be further answered that there is pershaps no subject in which the public have a deeper interest than in all that relates to the conduct of public servants of the State,—no subject of Parliamentary discussion which more requires to be made known than an inquiry relating to it".

At page 95, dealing with the contention based upon the Standing Orders of both the Houses of Parliament prohibiting the publication of the proceedings, the learned Chief Justice proceeded to state as follows :

"The fact, no doubt, is, that each House of Parliament does, by its standing orders, prohibit the publication of its debates. But, practically, each House not only permits, but also sanctions and encourages, the publication of its proceedings, and actually gives every facility to those who report them. Individual members correct their speeches for publication in Hansard or the public journals, and in every debate reports of former speeches containing therein are constantly referred to. Collectively as well as individually, the members of both Houses would deplore as a national misfortune the withholding their debates from the country at large. Practically speaking, therefore, it is idle to say that the publication of Parliamentary proceedings is prohibited by Parliament. The standing orders which prohibit it are obviously maintained only to give to each House the control over the publication of its proceedngs, and the power of preventing or correcting any abuse of the facility afforded."

I have given the said passages *in extenso* as they give neatly and graphically not only the extent of the privilege in modern times, but the reasons for and the process by which the larger concept of the privilege has been gradually reduced to its present form. These are weighty observations and, if they were appropriate to the conditions obtaining in the 19th century, they would be more so in 1950, when the Parliamentary system of government was perfected in England.

Jennings in his book on "The British Constitution" states at page 82 thus :

"All this assumes, of course, that the House debates in public. Government and Opposition speak to each other, but for the eduction of the people. The criticisms brought against the Government are the criticisms of ordinary individuals ; the answers of theGovernment are formally answers

1. (1868) L.R. 4 Q.B. 73.

to the Opposition, but substantially they are replies to the questions raised in the factory, the railway carriage and the office. The members of the House of Commons were not elected for their special qualifications, but because they supported the policies which the majority of their constituents were prepared to accept. They have no authority except as representatives, and in order that their representative character may be preserved they must debate in public. Secret sessions were suited to the oligarchic government of the eighteenth century. They are the negation of democratic principles. No doubt there are exceptional occasions when secrecy is justified."

This passage succinctly gives the principles underlying the doctrine that in a democratic country, debates in Parliament are public and there should not be any prohibition against the publication of the said debates.

The extent of the privilege of the House of Commons in regard to the publication of its proceedings may be stated thus : In the seventeenth century, the House of Commons made standing orders prohibiting the publication of its proceedings. But that was a necessary precaution in that critical period when the representatives of the people were in conflict with the Crown and they were careful that their proceedings should not reach the ear of the Crown. In the aristocratic eighteenth century, the opposition to publication was founded not only on the fear of misrepresentation, but on impatience of the pressure of public opinion. But gradually and imperceptibly, as a result of conflicts and compromises and as Parliamentary form of government became perfect and broadbased, not only publication was allowed but actually encouraged by the House of Commons. In the year 1950, it would be unthinkable and indeed would have been an extraordinary phenomenon for the House of Commons claiming the privilege of preventing the publication of its proceedings. The said orders, though not expressly repealed or modified, were no longer enforced in accordance with their tenor ; but were in effect modified by practice and precedents. The stringent part of the orders had fallen into disuse and in practice it was restricted to *mala fide* publication of the proceedings. I, therefore, hold that in the year 1950, the House of Commons had no privilege to prevent the publication of the correct and faithful reports of its proceedings save those in the case of secret sessions held under exceptional circumstances and had only a limited privilege to prevent *mala fide* publication of garbled, unfaithful or expunged reports of the proceedings.

It follows from my view, namely, that the petitioner's fundamental right under Article 19 (1) is preserved despite the provisions of Article 194 (3) of the Constitution that the petitioner is entitled to succeed. I am further of the opinion that even if Article 194 (3) of the Constitution excludes the operation of Article 19 (1), the petitioner in the circumstances of the present case would not be in a better position. That apart, the charge as disclosed either in the notice served on the petitioner or in the enclosures annexed thereto does not impute any *mala fide* intention to the petitioner. The notice only says that the Committee of Privileges, on the basis of the publication of the news-item in the SEARCHLIGHT, found that a *prima facie* case of breach of privilege has been made out against the petitioner. The resolution enclosed therein indicates that the petitioner committed a breach of privilege by printing the expunged portion of the speech of Maheshwara Prasad Narayan Singh and thereby published a perverted and unfaithful report of the proceedings. Other documents enclosed with the notice contained a motion moved in the House by another member charging the petitioner for publishing the expunged portion of the speech. The petitioner in his petition states that till May 31, it was not known to any member of the staff of the SEARCHLIGHT, including the petitioner, that any portion of the debate in question had been expunged from the official record of the Assembly. Though in the official record of the proceedings, portions of the speech reported have been expunged, no order of the Speaker expunging any portions of the speech made on May 30, has been produced. Admittedly there was no order of the Speaker prohibiting the publication of the expunged portion of the speech. In the counter-affidavit filed by the respondents, they did not allege any *mala fide* to the petitioner but they took their stand on the fact that the Legislature had the privilege of preventing the petitioner from publishig the expunged portion of the speech. In the circumstances, neither the notice nor the documents enclosed with the notice dis-

close that the petitioner published the speech, including the expunged portion *mala fide*, or even with the knowledge that any portion of the speech was directed to be expunged. As I have pointed out, the Legislature has the privilege of preventing only *mala fide* publication of the proceedings of the Legislature and, as in this case the petitioner is not alleged to have done so, the Legislature has no power to take any action in respect of the said publication.

In the result, the petition is allowed. A writ of prohibition will issue restraining the respondents from proceeding against the petitioner for the alleged breach of privilege by publishing in the issue of the SEARCHLIGHT, dated May 31, 1957, an account of the debate of the House (Legislative Assembly, Bihar) of May 30, 1957.

ORDER.—In view of the Judgment of the majority, the petition is dismissed. There will be no order as to costs.

Petition dismissed.

SUPREME COURT OF INDIA.

[Original Jurisdiction.]

PRESENT :—S. R. DAS, *Chief Justice*, N. H. BHAGWATI, B. P. SINHA, K. SUBBA RAO AND K. N. WANCHOO, JJ.

Gullapalli Nageswara Rao and others .. *Petitioners**

v.

Andhra Pradesh State Road Transport Corporation and another .. *Respondents.*

B. Somasankara Sastri .. *Intervener.*

Motor Vehicles Act (IV of 1939) *as amended by Act (C of* 1956), *Chapter IV-A—Constitutional validity—Fundamental Rights under Article* 31 *or* 19 (1) (*g*) *of the Constitution of India—If infringed.*

Motor Vehicles Act (IV of 1939) *as amended, sections* 68-*C and* 68-*D—Functions of the Government under section* 68-*D* (2)*—If judicial—Scheme of nationalisation—Proposal by the Manager of the State Transport Undertaking of the erstwhile Hyderabad State—Hearing of objections by the secretary in charge of Transport department—Decision by Minister—If offends principles of natural justice—Implementation of the Scheme by the Road Transport Corporation—Legality.*

By Court.—The argument that section 68-F (in Chapter IV-A introudced by amending Act C of 1956) of the Motor Vehicles Act (IV of 1939) transfers, in effect and substance, the business of the existing permit-holders to the State or its nominee is fallacious. It cannot be said that if the Transport Authority cancels the permit of a person carrying on the business of transport under the provisions of the unamended Act and gives it to another the process involves the transfer of the business of the quondam permit-holder to the new entrant. Such being the legal position in the case of permits issued prior to the introduction of Chapter IV-A, equally there cannot be any such transfer of business in the case of issue of permit to the State Transport undertaking by cancelling the permit held by a citizen. Looking at it from the standpoint of his assets also, none of the assets are transferred to the State Transport undertaking. In fact the entire assets of the business are left with him. It cannot be held from section 68-G that the legislature proceeded on the assumption that a transfer of the business was involved in the process laid down in Chapter IV-A. Therefore Chapter IV-A cannot be held to provide for the transfer of ownership or the right to possession of any property to the State or to a corporation, owned or controlled by the State.

Under Article 31 of the Constitution of India unless there is such a transfer, the law shall not be deemed to provide for compulsory acquisition or requisitioning of property and no compensation need be provided for under Article 31 (2). Chapter IV-A does not infringe the fundamental rights of the petitioner under Article 31. Nor is there any infringement of Article 19 (1) (*g*) as it is subject to Article 19 (6) (ii) inserted by the Constitution First Amendment 1951.

The Road Transport Department of Andhra Pradesh, though originally was part of the department of the erstwhile Hyderabad State, providing for road transport service in Telengana, a part of that State is none-the-less the Road Transport Department of Andhra Pradesh State maintained by the State and clearly falls within the definition of the State Transport undertaking in the Motor Vehicles Act, section 68-A. It was within its legal competence to initiate the scheme and the scheme published by the General Manager of the Department is proper.

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* Petition No. 100 of 1958. 5th November, 1958.

An express recital of the formation of the opinion by the undertaking in the scheme is not made a condition of the validity of the same. That the State Transport undertaking had formed its opinion can be gathered from the preamble to the scheme proposed and published under the provisions of section 68-C.

On the contentions that the State Government in approving the scheme under section 68-D (2) was discharging a quasi-judicial act and therefore the Government should have given a *personal* hearing instead of entrusting that duty to its Secretary and that the Secretary in charge of Road Transport (one of the parties to the inquiry)—

Held by majority (*Wanchoo* and *B. P. Sinha, JJ.*, dissenting).—Section 68-C makes a clear distinction between the purpose and the particulars of the scheme. The scheme may affect the proprietary rights of individual permit-holders doing transport business in a particular route or routes. Under section 68-D read with rules 8 and 10 made under the Act any person affected by the proposed scheme may file objections and the State Government is enjoined to approve or modify the scheme after hearing the objectors and the State Transport undertaking. The objections may be personal to the objectors (permit-holders) or in the interest of the public and so there is a proposal and an opposition and the third party the Government is to decide that *lis* and *prima facie* is to do it judicially ; it is put beyond doubt by the provisions in section 68-D (2). Therefore the Act imposes a duty on the Government to decide judicially in approving or modifying the scheme.

Province of Bombay v. *Khushal Das Advani*, (1950) 2 M.L.J. 703 : (1950) S.C.J. 451 : 1950 S.C.R. 621, *Nagendra Nath Bora* v. *Commissioner of Hills Division*, (1958) S.C.J. 798 : A.I.R. 1958 S.C. 378, and *Express Newspapers Ltd.* v. *Union of India*, (1958) S.C.J. 1113 : A.I.R. 1958 S.C. 578, relied on.

Franklin v. *Minister of Town & Country Planning*, L.R. (1948) A.C. 87, distinguished.

The fundamental principle of natural justice is that in the case of quasi-judicial proceedings, the authority empowered to decide, the dispute between opposing parties must be without any bias towards one side or other and it is also important that a person interested in one party should not take part, even formally, in the proceedings. The hearing by the Secretary in charge of Transport Department certainly offends the said principles of natural justice and the proceeding and the hearing given in violation thereof is bad.

Further the divided responsibility of the Secretary hearing and the Chief Minister deciding is destructive of the concept of judicial hearing, though it be in accordance with the rules and the personal hearing becomes an empty formality ; the procedure followed offends another principle of judicial procedure.

In the result the order approving the scheme is quashed as the enquiry was not made in conformity with the principles of natural justice.

Per *Wanchoo, J.* (*Sinha, J.*, agreeing) :—The scope of the inquiry under section 68-D (2) is only of a limited character though the decision may affect citizens providing transport. The State Government is not determining whether there should be State monopoly or private enterprise when it is considering objections under section 68-D (2) ; it is only considering whether the scheme put forward is such as can be approved with or without modifications within the four corners of the law laid down in section 68-C. If it comes to that conclusion, complete or partial exclusion of citizens follows. From the nature and scope of the hearing under section 68-D (2) there is really no *lis*. Even though there may be two parties there is no determination of the rights of parties. It cannot, therefore, be said that the nature of hearing in the case makes the State Government a quasi-judicial tribunal and the decision, a quasi-judicial act within the meaning of *Advani's case*, (1950) 2 M.L.J. 703 : (1950) S.C.J. 451 : 1950 S.C.R. 621.

The function of the State Government, when it considered the objections under section 68-D (2) was only administrative and not quasi-judicial. *Franklin's Case*, L.R. (1948) A.C. 87, applied.

Case-law referred.

When one is dealing with a body as the State Government one has to take into account the procedure usually followed by the State Government in matters that come before it. In these circumstances the order of the Minister, in the absence of specific rules on the point, that the hearing is to be by the Secretary complies with the essential requirement of an oral hearing by the Government before the decision of the objections. The bifurcation of the function of hearing from the function of deciding cannot in the circumstances, when the hearing was administrative, be said to be improper or against rule 10 and was necessary in order that the Government may function efficiently. The hearing by the Secretary was sufficient compliance of the rule 10, which required a personal hearing.

Bearing in mind that the hearing was of an administrative nature, and in view of the proposal having been made by one of the Government's limbs if the Head of the Department, the Secretary in charge of Transport hears the objections it does not follow he was an improper person to give the hearing. Further he only made notes of the hearing and conveyed the arguments to the Chief Minister and as the matter was purely administrative the procedure cannot be held improper.

The petition therefore fails and has to be dismissed.

Per *Sinha, J.* (agreeing with *Wanchoo, J.*).—In order that a determination may be judicial or quasi-judicial it is essential that it should be *objective*, based on evidence *pro* and *con*, by a determinate

authority who should not have the right to delegate such a judicial function. Section 68-D (2) authorises the State Government to decide whether the Scheme should be approved or modified. 'State Government' may mean the Governor himself or any of the Ministers or any of the officers in the Secretariat according to the rules of business promulgated under Article 166 of the Constitution. The objections could be heard by any one who has been delegated that power. If that is correct the unction under section 68-D (2) does not satisfy the test of a judicial hearing.

No objective tests have been laid down in Chapter IV-A with reference to which the determination has to be arrived at. This also points to the conclusion that the determination under section 68-D (2) is not judicial.

Further the provisions of sections 68-C and 68-D do not contemplate any *lis*. It is a mistake to suppose that the objections contemplated by section 68-D (1) could be on grounds personal to the objector. The effective words in the section 'file objections thereto", that is, the scheme published under section 68-C leads to the said conclusion.

What is relevant for the purpose of inquiry is whether the published scheme is in the interest of the public. It is not correct to view the proceedings under Chapter IV-A before the State Government as a *lis* between any rival claims unlike proceedings under Chapter IV of the Act.

In view of the above considerations, there is no *lis* between rival claims, no determinate tribunal to determine any *lis* and no procedure prescribed in Chapter IV-A, approximating or even simulating judicial procedure. That being so there can be no question of any bias because there can be none in a determination come to by officers of the Government in discharge of their administrative duties.

Hence in agreement with Wanchoo, J., the Government or the Minister concerned when passing an order under section 68-D (2) was acting only in an administrative capacity and all considerations flowing from the basic idea of the proceedings being quasi-judicial are wholly out of the way. There can be no interference and the petition has to be dismissed.

By Court, *Held* that the objection that there was no real hearing as the issue had been prejudged has no force.

It was further held that the Road Transport Corporation was the successor of the State Transport undertaking which published the scheme and got it approved and could implement the scheme.

(Petition under Article 32 of the Constitution for enforcement of Fundamental Rights.)

M. K. Nambiar, Senior Advocate (*K. Mangachari*, *G. Suryanarayana* and *T.V. R. Tatachari*, Advocates, with him) for Petitioners and Intervener.

M. C. Setalvad, Attorney-General for India (*R. Ganapathi Iyer*, *P.R. Ramachandra Rao* and *T. M. Sen*, Advocates with him) for Respondents.

The Judgment of the Court was delivered by

Subba Rao, J.—This is an application under Article 32 of the Constitution for the enforcement of the petitioners' fundamental right to carry on the business of motor transport in Krishna District in Andhra Pradesh, and for prohibiting the respondents from taking over the routes on which the petitioners have been plying their stage carriages.

The petitioners have been carrying on motor transport business in Krishna District for several years past by obtaining permits under the Motor Vehicles Act, 1939 (IV of 1939), as amended by Act C of 1956, hereinafter called the Act, in respect of various routes. They estimate the value of their investment in the business at a sum of Rs. 20,00,000.

The amending Act inserted a new Chapter IV-A in the Act providing for the State Transport Undertaking running the business to the exclusion, complete or partial, of all other persons doing business in the State. Chapter IV-A provided for a machinery called the State Transport Undertaking, defined under section 68-A (*b*) as an undertaking providing road transport service, to run the transport business in the State. In exercise of the powers conferred by section 68-C of the Act, one Shri Guru Pershad, styled as the General Manager of the State Transport Undertaking of the Andhra Pradesh Road Transport, published a scheme for the purpose of providing an efficient, adequate, economical and properly co-ordinated transport service in public interest to operate the transport service mentioned therein with effect from the date notified by the State Government. Objections were invited within 30 days from the date of the publication of the proposal in the Official

Gazette, *viz.*, November 14, 1957. 138 objections were received. Individual notices were issued by the State Government by registered post to all the objectors. On December 26, 1957, the Secretary to Government, Home Department, in charge of transport, heard the objections. 88 of the objectors represented their cases through their advocates ; three of them represented their cases personally and the rest were not present at the time of hearing. After considering all the objections and after giving an opportunity to the objectors, their representatives and the rdpresentatives of the State Transport Undertaking, the State Government foune that the objections to the scheme were devoid of substance. On that finding, the State Government approved of the scheme in G.O. Ms. 58, Home (Transport IV), dated January 7, 1958, and the approved scheme was published in the *Andhra Pradesh Gazette* dated January 9, 1958. The scheme was ordered to come into force with effect from January 10, 1958. The Government of Andhra Pradesh also established a Road Transport Corporation under the Road Transport Corporations Act, 1950 (LXIV of 1950), called the Andhra Pradesh Road Transport Corporation, with effect from January 11, 1958, and by its order, dated January 11, 1958, the said Corporation was empowered to take over the management of the erstwhile Road Transport Department. The said Transport Corporation is now implementing the scheme of nationalisation of bus transport under a phased programme. The petitioners, who are plying their buses on various routes in Krishna District, apprehending that their routes would be taken over by the Corporation pursuant to the aforesaid scheme, seek the aid of this Court to protect their fundamental right to carry on their business against the action of the State Corporation on various grounds.

Mr. M. K. Nambiar, appearing for the petitioners, contends that the scheme, in pursuance of which the bus routes operated by the petitioners are sought to be taken over by the State Road Transport Corporation, is *ultra vires* and illegal on two grounds, *viz.*, (*a*) that the provisions of Chapter IV-A of the Act violates the fundamental rights secured to the citizens by the Constitution and (*b*) that the scheme framed under the Act is *ultra vires* the Act.

The first ground is sought to be supported by the contention that Chapter IV-A of the Act, in substance and effect, authorizes the State to acquire the undertakings of citizens without providing for compensation for the entire undertakings and therefore it is a fraud on the Constitution, particularly on Article 31 thereof. Shortly stated, his argument is that under Article 31 of the Constitution no law shall be made for the transfer of ownership or right to possession of any property to the State or to a Corporation without fixing the amount of compensation or specifying the principle on which compensation is to be determined and given, and that Chapter IV-A of the Act is a colourable legislation enabling such a transfer of ownership without providing for compensation for the property transferred, under the guise of cancellation of a permit.

To appreciate this argument it would be convenient, at this stage, to read the relevant provisions of the Articles of the Constitution, omitting the words unnecessary for the purpose of this case.

"*Article* 19 (1).—All citizens shall have the right—

....

(*g*) to practise any profession, or to carry on any occupation, trade or business.

....

(6) Nothing in sub-clause (*g*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause, shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

(i) ....

(ii) the carrying on by the State, or by a Corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

Article 31 (1).—No person shall be deprived of his property save by authority of law.

(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given ; and no such law shall be called in question in any Court on the ground that the compensation provided by that law is not adequate.

(2-A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a Corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property."

The Constitution (First) Amendment Act of 1951, which came into force on June 18, 1951, amended clause (6) of Article 19 by adding sub-clause (ii) to that clause, along with other amendments. Clause (2) of Article 31 has been amended, and clause (2-A) has been inserted by the Constitution (Fourth) Amendment Act, 1955. Clause (2-A) has been inserted with a view to supersede the majority decisions of this Court in the cases of *State of West Bengal* v. *Subodh Gopal Bose and others*[1], *Dwarkadas Shriniwas of Bombay* v. *Sholapur Spinning and Weaving Co. Ltd. and others*[2] and *Saghir Ahmed* v. *State of U. P.*[3] In *Subodh Gopal's case*[1] a majority of a Bench of this Court held :

"Clauses (1) and (2) of Article 31 are thus not mutually exclusive in scope and content, but should in my view, be read together and understood as dealing with the same subject, namely, the protection of the right to property by means of the limitations on the State power referred to above, the deprivation contemplated in clause (1) being no other than the acquisition or taking possession of property referred to in clause (2)."

In *Dwarkadas's case*[2], this Court, while confirming the aforesaid principle, held that the word ' acquisition ' has quite a wide concept, meaning the procuring of property or the taking of it permanently or temporarily and need not be confined to the acquisition of legal title by the State in the property taken possession of. In *Saghir Ahmad's case*[3], applying the said principles, this Court held (at page 728) :

" If the effect of prohibition of the trade or business of the appellants (citizens) by the impugned legislation amounts to deprivation of their property or interest in a commercial undertaking within the meaning of Article 31 (2) of the Constitution, does not the legislation offend against the provision of that clause inasmuch as no provision for compensation has been made in the Act ? "

It may be noted that though the said decision was given after the Constitution (First) Amendment Act, 1951, amending Article 19 (6), it dealt with a matter that arose before the said amendment came into force. In the aforesaid decisions, this Court by a majority broadly laid down the two principles ; (*a*) that both clauses (1) and (2) of Article 31 dealt with the doctrine of ' eminent domain ' ; they dealt with the topic of ' compulsory acquisition of property '; and (*b*) that the word ' acquisition ' does not necessarily imply acquisition of legal title by the State in the property taken possession of, but may comprehend cases where the citizen has been ' substantially dispossessed ' of the right to enjoy the property, with the result that the right to enjoy property has been ' seriously ' impaired or the value of the property has been ' materially ' reduced by the impugned State legislation.

The Constitution (Fourth) Amendment Act, 1955, amended clause (2) of Article 31 and inserted clause (2-A) in that Article. The amendments, in so far as they are relevant to the present purpose, substitute in place of the words ' taken possession of or acquired ' the words ' compulsorily acquired or requisitioned ' and provide an explanation of the word ' acquired and requisitioned ' in clause (2-A). The result is that unless the law depriving any person of his property provide for the transfer of the ownership or right to the possession of any property to the State, the law does not relate to 'acquisition or requisition' of property and therefore the limitations placed upon the legislature under clause (2) will not apply to such law. While realising this legal position brought by the amendment to the Constitution, the

1. (1954) S.C.J. 127 : 1954 S.C.R. 587, 608.
2. (1954) 1 M.L.J. 355 : (1954) S.C.J. 175 : 1954 S.C.R. 674.
3. (1954) S.C.J. 819 : (1955) 1 S.C.R. 707, 728.

learned counsel contends that the right to do business is property as held in *Saghir Ahmad's case*[1], and that Chapter IV-A of the Act in effect transfers ownership of that business to the Corporation, owned or controlled by the State, though not directly but by the dual process of preventing the citizen from doing the business and enabling the Corporation to do the same business in his place and that result is effected by a device with a view to avoid payment of compensation for the entire business so transferred. The colourable nature of the legislation, the argument proceeds, lies in its device or contrivance to evade limitations imposed under Article 31 (2). To solve the problem presented it is necessary to have a correct appreciation of the phrase 'colourable legislation'. This Court considered this question in *The State of Bihar* v. *Maharajadhiraja Sir Kameshwar Singh of Darbhanga*[2]. In that case the constitutional validity of the Bihar Land Reforms Act, 1950 (Bihar XXX of 1950), was questioned. In the context of the Bihar Land Reforms Act, 1950 (Bihar XXX of 1950) it was contended that the impugned Act was a fraud on the Constitution and therefore void. It was stated that the Act, while pretending to comply with the Constitutional provisions when it provided for the payment of compensation, in effect produced a scheme for non-payment of compensation by shift or contrivance. Mahajan, J., as he then was, in rejecting the argument observed, at page 947, thus :

"All these principles are well-settled. But the question is whether they have any application to the present case. It is by no means easy to impute a dishonest motive to the legislature of a State and hold that it acted *mala fide* and maliciously in passing the Bihar Land Reforms Act or that it perpetrated a fraud on the Constitution by enacting this law. It may be that some of the provision of the Act may operate harshly on certain persons or a few of the zamindars and may be bad if they are in excess of the legislative power of the Bihar Legislature but from that circumstance it does not follow that the whole enactment is a fraud on the Constitution. From the premises that the estate of half-a-dozen zamindars may be expropriated without payment of compensation, one cannot jump to the conclusion that the whole of the enactment is a fraud on the Constitution or that all the provisions as to payment of compensation are illusory."

The aforesaid observations lend support to the argument that the doctrine of colourable legislation imputes dishonest motive or *mala fides* to the State making the law. But, Mukherjea, J., as he then was, clarified the legal position in *K. C. Gajapati Narayana Deo and others* v. *The State of Orissa*[3]. It was contended in that case that the Orissa Estates Abolition Act, 1952, was a colourable legislation and as such void. Adverting to that argument, Mukherjea, J., as he then was, says at page 10 thus :

"It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of *bona fides* or *mala fides* on the part of the Legislature. The whole doctrine resolves itself into the question of competency of a particular Legislature to enact a particular law. If the Legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand if the Legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power.........If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the Legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression 'colourable legislation,' has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a Legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears on proper examination, to be a mere pretence or disguise. As was said by Duff, J., in *Attorney-General for Ontario* v. *Reciprocal Insurers & others*[4].

'Where the law making authority is of a limited or qualified character it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what is that the Legislature is really doing.'

In other words, it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject-matter in substance is something which is beyond the powers of that

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1. (1954) S.C.J. 819 : (1955) 1 S.C.R. 707, 728.
2. (1952) S.C.J. 354, 427 and 446 : 1952 S.C.R. 889, 1020 and 1056.
3. (1953) S.C.J. 592 : 1954 S.C.R. 1.
4. L.R. (1924) A.C. 328 at 337.

Legislature to legislate upon, the form in which the law is clothed would not save it from condemnation. The Legislature cannot violate the constitutional prohibitions by employing an indirect method."

We have quoted the observations *in extenso* as they neatly summarise the law on the subject. The legal position may be briefly stated thus : The Legislature can only make laws within its legislative competence. Its legislative field may be circumscribed by specific legislative entries or limited by fundamental rights created by the Constitution. The Legislature cannot over-step the field of its competency, directly or indirectly. The Court will scrutinize the law to ascertain whether the Legislature by device purports to make a law which, though in form appears to be within its sphere, in effect and substance, reaches beyond it. If, in fact, it has power to make the law, its motives in making the law are irrelevant.

The learned counsel for the petitioners can only succeed if he can establish that the provisions of Chapter IV-A constitute colourable legislation within the meaning of the aforesaid definition. To test the validity of the argument, it may be summarised thus : Business is 'property ' within the meaning of Article 19 (1) (*g*) of the Constitution. Chapter IV-A of the Act transfers the business to the Corporation controlled by the State Government. Such a law should have provided for payment of compensation for the business transferred to the State Corporation ; instead, it adopted the device of cancelling the permit of the citizen and giving it to the Corporation and providing compensation to the citizen only for the unexpired period of the permit.

We shall now proceed to ascertain whether any of the aforesaid ingredients of device or contrivance are established in this case. Does Chapter IV-A, in effect and substance, authorize, in law or fact, the transfer of the business of the citizens to the State or a Corporation, owned or controlled by the State ? Under Article 19 (1) of the Constitution, every citizen has a fundamental right to carry on any business subject to reasonable restrictions imposed by the State under clause (6) of Article 19 in the interest of the general public. The Constitution (First) Amendment Act, 1951, reserved to the State the right to make law for carrying on by the State or by a Corporation, owned or controlled by the State, any business to the exclusion, complete or partial, of the citizens or otherwise. The Constitution, therefore, enables the State to make a law placing reasonable restrictions on the right of a citizen to do business or to create a monopoly or to make a law empowering the State to carry on business to the exclusion of a citizen. The right to carry on business in transport vehicles on public pathways is certainly one of the fundamental rights recognized under Article 19 of the Constitution. The Motor Vehicles Act, 1939 (IV of 1939), regulates the right of a citizen to carry on the said business for protecting the rights of the public generally. 'Permit' is defined nnder clause (20) of section 2 of the Act to mean the document issued by the Commission or a State or Regional Transport Authority authorising the use of a transport vehicle as a contract carriage or stage carriage, or authorising the owner as a private carrier or public carrier to use such vehicle. Section 57 of the Act prescribes the procedure for applying for and granting permits to carry on the business in transport vehicles on public highways. Section 47 lays down the matters to be considered by the Regional Transport Authority in the disposal of applications for such transport carriers. Section 59 gives the conditions of every permit and also prohibits the transfer of permit from one person to another except with the permission of the Transport Authority. Under section 60, the Transport Authority which granted permit may cancel the permit or may suspend it for such period as it thinks fit for any of the reasons mentioned therein. Section 61 provides for cases where a permit-holder dies. That section enables the successor to use the permit for a period of three months and to get the permit transferred to him subject to the conditions laid down therein. Section 68-F authorises the Regional Transport Authority, for the purpose of giving effect to an approved scheme in respect of a notified area or notified route, to refuse to entertain any application for the renewal of any other permit, to cancel any existing permit, to modify the terms of any existing permit so as to render the permit ineffective beyond a specified date, and to reduce the number of vehicles authorised to be used under the permit. It is manifest from the aforesaid provisions that the Regional Transport Authority can, in exercise

of its regulatory power conferred on it in the interest of the public, issue a permit to a person in regard to a stage carriage authorising him to use the same in a partcular route for a particular period subject to the conditions laid down in the permit, suspend or cancel the same under specified conditions, and renew or refuse to renew the same after the expiry of the period subject to the conditions laid down in the Act. Under Chapter IV-A, if a scheme has been promulgated empowering the State Transport Undertaking to take on hand the transport service in relation to any area, route or portion thereof to the exclusion of any person, who has been carrying on the business in that route, the Transport Authority is empowered to cancel the existing permit and issue a permit to the State Transport Undertaking. It cannot be said that if the Transport Authority cancels the permit of a person carrying on his transport business in a route and gives it to another, the process involves a transfer of business or undertaking of the quondam permit-holder to the new entrant. Indeed the process does not involve even a transfer of the permit from one to another. The true position is that one permit comes to an end and another permit comes into being. The power of cancellation of a permit in favour of one and issuing a new permit to another are necessary steps in the regulatory jurisdiction entrusted to the Regional Transport Authority. The business of one has nothing to do with the business of another ; they are two independent businesses carried on under two different licences. If that be the true legal position in the case of issue of permits before Chapter IV-A was inserted in the Act, we cannot see that the power of cancellation of an existing permit and issuing one to the State Transport Undertaking should involve a transfer of the previous permit-holder's business to the State Transport Undertaking. The argument that the process contemplated by section 68-F of the Act involves two integrated steps, *viz.*, cancelling the existing permit and preventing the previous permit-holder from doing the business and then issuing a permit to a nominee of the State to enable it to do the same business and thereby, in effect and substance, transferring the business of the existing permit-holder to the State or its nominee, appears to be attractive, but, in our view, it is fallacious. It may be that by the said process the existing permit-holder is precluded from doing his business and it may also be that the State Transport Undertaking carries on a similar business ; but by no stretch of language or extension of legal fiction can it be said that the State Transport Undertaking is doing the same business which the previous permit-holder was doing. If there is no transfer in the case of cancellation of a permit in favour of one and issue of a new permit to another, equally there cannot be any such transfer in the case of issue of a permit to the State Transport Undertaking. Looking at the business not simply from the standpoint of the right to do it or the activity involved in it, but also from the standpoint of its assets, it becomes clear that no assets pertaining to the business of the quondam permit-holder are transferred to the State Transport Undertaking. Though the cancellation of the permit has the effect of crippling his business, none of the assets of the business is taken over by the State Transport Undertaking ; he is left in the possession of the entire assets of the business. It is no doubt true that in the context of the scheme of nationalisation he may not be able to make use of his assets in other routes or dispose of them at a great advantage to himself ; but, it cannot be said that by cancelling the permit, what is left with him is only the 'husk'. In fact the entire assets of the business are left with him and the State Transport Undertaking has not taken over the same.

Lastly it is said that section 68-G of the Act which provides for payment of compensation to the holder of the permit, indicates that the Legislature proceeded on the basis that the cancellation of a permit involved a 'transfer of property' from the previous permit-holder to the State. In our view, no such irresistible conclusion flows from the said provision; as the permit is cancelled before the expiry of the term fixed therein, the Legislature thought it fit and proper to give some compensation to the permit-holder who is prevented from doing his business for the unexpired period of the permit. Whether it is enacted by way of abundant caution, as the learned Attorney-General says, or the provision is made by the Legislature to mitigate the hardship that is caused to the permit-holder by the premature cancellation of the permit, we find it difficult to draw the inference from the said provision that the

Legislature assumed that a transfer of the business is involved in the process laid down in Chapter IV-A. We, therefore, hold that Chapter IV-A of the Act does not provide for the transfer of ownership or the right to possession of any property to the State or to a Corporation, owned or controlled by the State. Under Article 31 of the Constitution unless there is such a transfer, the law shall be deemed not to provide for compulsory acquisition or requisition of property ; and therefore, in such a case, no compensation need be provided for under Article 31 (2) of the Constitution. We therefore hold that Chapter IV-A of the Act does not infringe the fundamental right of the petitioners under Article 31 of the Constitution of India.

The next argument of the learned counsel for the petitioners is that even if Chapter IV-A of the Act is Constitutionally valid, the petitioners could be deprived of their rights only in accordance with the law enacted for the purpose and in the manner provided therein, and that in the present case, the scheme was promulgated in derogation of the provision of the said Chapter. The learned counsel contends that the provisions of sections 68-C and 68-D have not been complied with in framing the scheme. The learned counsel's contentions in this regard fall under different sub-heads, and we shall proceed to consider them seriatim.

The first contention is that no State Transport Undertaking is constituted under the Central Act and therefore the scheme initiated by the said Transport Undertaking constituted under the Motor Vehicles (Hyderabad Amendment) Act, 1956, was bad. To appreciate this argument some of the facts may be stated. Before the State of Andhra Pradesh was formed in November, 1956, eight districts, popularly called the Telengana, which are now in the Andhra Pradesh State, were formerly part of the Hyderabad State. On September 29, 1956, the Motor Vehicles (Hyderabad Amendment) Act, 1956, became law, whereunder Chapter IV-A was inserted in the Central Act in its application to the State of Hyderabad. Under section 68-A of Chapter IV-A of that Act, the State Transport Undertaking was defined to mean the Road Transport Department of the State providing road service. Under that Act, therefore, the Road Transport Department of the Hyderabad State was functioning as a statutory authority. After the States Re-organisation Act came into force, the said eight districts of the Hyderabad State became part of the State of Andhra Pradesh ; with the result that the Road Transport Department of the Hyderabad State became the Road Transport Department of the State of Andhra Pradesh, though it was exercising its powers only in respect of that part of the Andhra Pradesh State, popularly known as Telengana. After the Andhra Pradesh State was formed, Sri Guru Pershad, styled as the General Manager of the Andhra Pradesh Road Transport Undertaking, published the scheme under section 68-C of the Act. The argument is that the State Transport Authority constituted under Chapter IV-A of the Hyderabad (Amendment) Act was not legally constituted as the State Transport Undertaking under the Central Act and therefore, the initiation of the scheme by the Hyderabad State Transport Undertaking, which has no legal status under the Central Act was bad. It is also pointed out that the State Transport Authority under the Hyderabad Act differs from that under the Central Act in the following three respects: (1) Statutory parentage ; (2) character and constitution ; and (3) territorial jurisdiction; and therefore the authority constituted under the Hyderabad Act cannot function under the Central Act. This argument has no relevancy to the facts of the present case. We are not concerned in this case with a statutory authority created under one Act and pressed into service for the purpose of another Act, when the latter has adopted the said statutory authority as one constituted under that Act. Here there is the Andhra Pradesh Road Transport Department providing road transport service in Telengana, which is a part of that State, and that Department, when it was a part of the Hyderabad State was functioning as part of the Hyderabad State Secretariat. The mere fact that the Road Transport Department of the Andhra Pradesh State was originally part of a department of another State and came under the definition of the State Transport Undertaking of the Hyderabad Act could not make the said department any the less the Road Transport Department of the Andhra Pradesh State. Assuming for a moment that the Hyderabad Act is still in force in the Telengana area, there is nothing in law which prevents a department coming under the

definition of two statutes. Under the Act, the State Transport Undertaking means an undertaking providing road transport service where such undertaking is carried on by a State Government. The section does not prescribe the parentage of the undertaking or impose a condition that the undertaking should be providing transport service throughout the State. The State Government maintained the department for providing road transport service and therefore the department clearly falls within the definition of State Transport Undertaking. The citation from Salmond on Jurisprudence to the effect that the law in creating legal persons always does so by personifying some real thing does not touch the question that falls to be decided in this case ; for, the real thing, *viz.*, the department, falls under the definition of both the Acts and therefore it can function as a statutory authority under both the acts. We, therefore, hold that the Road Transport Department of the Andhra Pradesh Government is a State Transport Undertaking under the Central Act and therefore it was within its legal competence to initiate the scheme.

The next objection raised is that the scheme was published by Sri Guru Pershad, the General Manager of the State Transport Undertaking and that it has not been established that he had been legally authorized to represent the State Transport Undertaking, the statutory authority constituted under the Act. We have already held that the Transport Departmnet of the disintegrated Hyderabad State continued to function as the Transport Department of the Andhra Pradesh State after the merger of Telengana areas with the Andhra State. In the affidavit filed by the petitioners, it is stated that Sri Guru Pershad was the General Manager of the Road Transport Department of the erstwhile Hyderabad State, that he was never appointed as the General Manager of the State Transport Undertaking of the Andhra Pradesh State and that, therefore, he had no legal authority whatever to publish the scheme. In the counter-affidavit filed on behalf of the first respondent, it is averred that the General Manager of the Andhra Pradesh Road Transport, which was a State Transport undertaking within the meaning of section 68-B of the Act, prepared a scheme and that was published in the Andhra Pradesh Gazette on November 15,1957. It is therefore a common case that Sri Guru Pershad was the General Manager of the Road Transport Undertaking of the erstwhile Hyderabad State. It is not denied that Sri Guru Pershad continued to be the General Manager of that Department functioning in Andhra Pradesh. We have already held that the same department was the statutory authority functioning under the Central Act. Sri Guru Pershad was also the General Manager of that undertaking. In the circumstances, there is no substane in the contention that Sri Guru Pershad should have been appointed as the General Manager of the undertaking under the Central Act. This is the first argument under a different garb. The pre-existing Road Transport Department of the erstwhile Hyderabad State, with its General Manager, Sri Guru Pershad, continued to function as a statutory authority under the Central Act and therefore he had the legal authority to represent the State Transport Undertaking, which was a statutory authority. He published the scheme and subscribed it as Guru Pershad, the General Manager of the State Transport Undertaking (Andhra Pradesh State Road Transport). The notification, therefore, must be held to have been issued by the State Transport Undertaking functioning under the Central Act.

The learned counsel then contends that the scheme published does not disclose that the State Transport Undertaking was of the opinion that the scheme was necessary in the interests of the public and therefore, as the necessary condition for the initiation of the scheme was not complied with, the scheme could not be enforced. Section 68-C says that where any State Transport Undertaking is of opinion that for specified reasons it is necessary in the public interest that road transport service should be run or operated by the State Transport Undertaking, it may prepare a scheme giving particulars of the scheme and publish it in the Official Gazette. An express recital of the formation of the opinion by the undertaking in the scheme is not made a condition of the validity of the scheme. The scheme published in terms of the section shall give particulars of the nature of the service proposed to be rendered the area or route proposed to be covered and such other particulars respecting thereto.

It is true that the preparation of the scheme is made to depend upon the subjective opinion of the State Undertaking as regards the necessity for such a scheme. The only question, therefore, is whether the State Transport Undertaking formed the opinion before preparing the scheme and causing it to be published in the Official Gazette. The scheme published, as already noticed, was signed by Guru Pershad, General Manager, State Transport Undertaking, Andhra Pradesh Road Transport. The Preamble to the scheme reads :

"In exercise of the powers conferred by section 68-C of the Motor Vehicles Act, 1939, it is hereby proposed, for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport service in public interest, to operate the following transport services as per the particulars given below with effect from a date to be notified by the Government."

We have already held that Guru Pershad represented the State Transport Undertaking. The scheme was proposed by the said undertaking in exercise of the powers under section 68-C of thd Act for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport service in public interest. Except for the fact that the word 'opinion' is omitted, the first part of the section 68-C is incorporated in the Preamble of the scheme ; and, in addition, it also discloses that the scheme is proposed in exercise of the powers conferred on the State Transport Undertaking under section 68-C of the Act. The State Transport Authority can frame a scheme only if it is of opinion that it is necessary in public interest that the road transport service should be run or operated by the Road Transport Undertaking. When it proposes, for the reasons mentioned in the section, a scheme providing for such a transport undertaking, it is a manifest expression of its opinion in that regard. We gather from a reading of the scheme that the State Transport Undertaking formed the necessary opinion before preparing the scheme and publishing it. The argument of the learned counsel carries technicality to a breaking point and for the aforesaid reasons, we reject it.

The next attack of the learned counsel centres round the provisions of section 68-D (2) of the Act. It would be convenient, before adverting to his argument, to read section 68-D and the relevant rules made under the Act. They read :

Section 68-D : (1) Any person affected by the scheme published under section 68-C may, within thirty days from the date of the publication of the scheme in the Official Gazette, file objections thereto before the State Government.

(2) The State Government may, after considering the objections and after giving an opportunity to the objector or his representatives and the representatives of the State Transport Undertaking to be heard in the matter, if they so desire, approve or modify the scheme.

(3) The scheme as approved or modified under sub-section (2) shall then be published in the Official Gazette by the State Government and the same shall thereupon become final and shall be called the approved scheme and the area or route to which it relates shall be called the notified area or notified route :

Provided that no such scheme which relates to any inter-State route shall be deemed to be an approved scheme unless it has been published in the Official Gazette with previous approval of the Central Government.

Rule 8 : *Filing of objections (procedure)* :—

Any person, concern or authority aggrieved by the scheme published under section 68-C may within the specified period, file before the Secretary to Government in charge of Transport Department, objections and representations in writing setting forth concisely the reasons in support thereof.

Rule 9 : *Conditions for submission of objections* :—

No representation or objection in respect of any scheme published in the Official Gazette shall be considered by the Government unless it is made in accordance with rule 8.

Rule 10 : *Consideration of scheme (Procedure regarding)* :—

After the receipt of the objections referred to above, the Government may, after fixing the date, time and place for holding an enquiry and after giving if they so desire, at least seven clear days' notice of such time and place to the persons who filed objections under rule 8,proceed to consider the objections andpass such orders as they may deem fit after giving an opportunity to the person of being heard in person or through authorised representatives."

Under the section, the procedure prescribed for the approval of a scheme may be summarized thus : The State Transport Undertaking prepares a scheme providing for road transport service in relation to an area to be run or operated by the State Transport Undertaking, whether to the exclusion, complete or partial, of other persons, and publishes it in the Official Gazette. Any person affected by the scheme may, within thirty days from the date of its publication, file before the Secretary to Government in charge of Transport Department objections and representations in writing with reasons in support thereof. After receiving the objections and representations, the Government fixes a date for the hearing and after giving an opportunity to the persons of being heard in person or by authorized representatives, considers the objections and then modifies or approves of the scheme.

The following procedure was in fact followed by the Government in this case : After the scheme was prepared and published in the Official Gazette, the petitioners and others filed objections before the Secretary to Government Transport Department, within the time prescribed. 138 objections were received and individual notices were issued by the Government by registered post to all the objectors fixing the date of the hearing for December 26, 1957. The Secretary to Government, Home Department, in charge of Transport, heard the representations made by the objectors, some in person and others through their advocates, and also the representations made by the General Manager of the Road Transport Undertaking. The Secretary, after hearing the objections, prepared notes and placed the entire matter, with his notes, before the Chief Minister, who considered the matter and passed orders rejecting the objections and approving the scheme ; and the approved scheme was thereafter issued in the name of the Governor.

On the aforesaid facts, the first contention raised is that the State Government in approving the scheme was discharging a quasi-judicial act and therefore the Government should have given a personal hearing to the objectors instead of entrusting that duty to its Secretary. Secondly, it is stated that a judicial hearing implies that the same person hears and gives the decision. But in this case the hearing is given by the Secretary and the decision by the Chief Minister. Thirdly, it is contended on the same hypothesis, that even if the hearing given by the Secretary be deemed to be a hearing given by the State Government, the hearing is vitiated by the fact that the Secretary who gave the hearing is the Secretary in charge of the Transport Department. The Transport Department, it is stated, in effect was made the judge of its own cause, and this offends one of the fundamental principles of judicial procedure. Lastly, it was pointed out that though the enquiry was posted for hearing on December 26, 1957, even before the enquiry was commenced, the Chief Secretary to the Government gave an interview to the '*Deccan Chronicle*' and the '*Golconda Patrica*' to the effect that the Government had already taken a decision to nationalize the road transport in Krishna District and some routes had been chosen, including the Guntur-Vijayawada route, thereby indicating that the Government has prejudged the case before holding the enquiry. The learned Attorney-General counters the said argument by stating that the State Government strictly followed the procedure prescribed unser section 68-C of the Act, that the said Government, being an impersonal body, gave the hearing through the machinery prescribed by law, that the said Government was discharging only an administrative act and not a judicial act in the matter of approving the scheme, that even if it did perform a judicial act, the Home Secretary in charge of Transport Department had only collected the material and the final orders were made only by the Chief Minister and that the Chief Secretary's press interview was nothing more than a mere indication of the factum of the proposed scheme.

At the outset it would be convenient to consider the question whether the State Government acts quasi-judicially in discharging its functions under section 68-C of the Act. The criteria to ascertain whether a particular act is a judicial act or an administrative one, have been laid down with clarity by Lord Justice Atkin in

Rex v. *Electricity Commissioners, Ex Parte London Electricity Joint Committee Co.*[1], elaborated by Lord Justice Scrutton in *Rex* v. *London Country Council, Ex Parte Entertainments Protection Association Ltd.*[2] and authoritatively re-stated by this Court in *Province of Bombay* v. *Khusaldas S. Advani*[3]. They laid down the following conditions : (*a*) the body of persons must have legal authority ; (*b*) the authority should be given to determine questions affecting the rights of subjects and (*c*) they should have a duty to act judicially. In the last of the cases cited *supra*, Das, J., as he then was, analysed the scope of the third condition thus at page 725 :

"(i) that if a statute empowers an authority not being a Court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statue which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other there is a *lis* and *prima facie* and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act ; and

(ii) that if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority and the contest is between the authority proposing to the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially."

In the case In re *Banwarilal Roy*[4], Das, J., as he then was, said much to the same effect at page 800.

"A judicial or quasi-judicial act, on the other hand, implies more than mere application of the mind or the formation of the opinion. It has reference to the mode or manner in which that opinion is formed. It implies 'a proposal and an opposition' and a decision on the issue connotes 'hearing evidence and opposition' as Scrutton, L.J., expressed it. The degree of formality of the procedure as to receiving or hearing evidence may be more or less according to the requirements of the particular statute, but there is an indefinable yet an appreciable difierence between the method of doing an administrative or executive act and a judicial or quasi-judicial act."

This statement is practically in accord with the first proposition extracted above. This Court again, in *Nagendra Nath Bora and another* v. *Commissioner of Hills Division*[5] in the context of the provisions of Eastern Bengal and Assam Excise Act, 1910 (I of 1910), considered the scope of the concept of 'judicial act'. Sinha, J., who delivered the judgment of the Court, made the following observations at page 408 :

"Whether or not an administrative body or authority functions as a purely administrative one or in a quasi-judicial capacity, must be determined in each case, on an examination of the relevant statute and the rules framed thereunder."

In *Express Newspapers, Ltd.* v. *The Union of India*[6], this Court again reviewed the law on the subject to ascertain whether the Wage Board functioning under the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 (XLV of 1955) was only discharging administrative functions or quasi-judicial functions. Bhagwati, J., made the following observation at page 613 :

"If the functions performed by the Wage Board would thus consist of the determination of the issues as between a proposition and an opposition on data and materials gathered by the Board in answers to the questionnaire issued to all parties interested and the evidence led before it, there is no doubt that there would be imported in the proceedings of the Wage Board a duty to act judicially and the functions performed by the Wage Board would be quasi-judicial in character."

The aforesaid three decisions lay down that whether an administrative Tribunal has a duty to act judicially should be gathered from the provisions of the particular statute and the rules made thereunder, and they clearly express the view that if an authority is called upon to decide respective rights of contesting parties or, to put it in other words, if there is a *lis*, ordinarily there will be a duty on the part of the said authority to act judicially. Applying the aforesaid test, let us scrutinize the provisions of sections 68-C and 68-D and the relevant rules made under the Act to ascertain whether under the said provisions the State Government performs a judicial act or an administrative one. Section 68-C may be divided into three parts : (i) The State Transport Undertaking should come to an opinion that it is necessary in public interest that the road transport service in general or any particular class of

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1. L.R. (1924) 1 K.B. 171.
2. L.R. (1932) 2 K.B. 215.
3. (1950) 2 M.L.J. 703 : (1950) S.C.J. 451 : 1950 S.C.R. 621.
4. (1944) 48 C.W.N. 766.
5. (1958) S.C.J. 798 : A.I.R. 1958 S.C. 398.
6. (1958) S.C.J. 1113 : A.I.R. 1958 S.C. 578.

such service in relation to any area or route or portion thereof should be run or operated by the State Transport Undertaking, whether to the exclusion, complete or partial, of other persons otherwise; (ii) it forms that opinion for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport service; and (iii) after it comes to that opinion it prepares a scheme giving particulars of the nature of the services proposed to be rendered, area or route proposed to be covered and such other particulars respecting thereto as may be prescribed and causes it to be published in the Official Gazette. The section, therefore makes a clear distinction between the purpose for which a scheme is framed and the particulars of the scheme. To state it differently, though the purpose is to provide an efficient, adequate, economical and co-ordinated road transport service in public interest, the scheme proposed may affect individual rights such as the exclusion, complete or partial, of other persons or otherwise, from the business in any particular route or routes. Under section 68-C, therefore, the State Transport Undertaking may propose a scheme affecting the proprietary rights of individual permit-holders doing transport business in a particular route or routes. The said proposal threatens the proprietary right of that individual or individuals. Under section 68-D read with rules 8 and 10 made under the Act, any person affected by the aforesaid proposed scheme may file objections within the prescribed time before the Secretary of the Transport Department. Under the said provisions, the State Government is enjoined to approve or modify the scheme after holding an enquiry and after giving an opportunity to the objectors or their representatives and the representatives of the State Transport Undertaking, to be heard in the matter in person or through authorised representatives. Therefore, the proceeding prescribed is closely approximated to that obtaining in Courts of justice. There are two parties to the dispute. The State Transport Undertaking, which is a statutory authority under the Act, threatens to infringe the rights of a citizen. The citizen may object to the scheme on public grounds or on personal grounds. He may oppose the scheme on the ground that it is not in the interest of the public or on the ground that the route which he is exploiting should be excluded from the scheme for various reasons. There is, therefore, a proposal and an opposition and the third party, the State Government is to decide that *lis* and *prima facie* it must do so judicially. The position is put beyond any doubt by the provision in the Act and the Rules which expressly require that the State Government must decide the dispute according to the procedure prescribed by the Act and the Rules framed thereunder, *viz.*, after considering the objections and after hearing both the parties. It therefore appears to us that this is an obvious case where the Act imposes a duty on the State Government to decide the act judicially in approving or modifying the scheme proposed by the Transport Undertaking.

The learned Attorney-General argues that sections 68-C and 68-D do not contemplate the enquiry in regard to the rights of any parties, that the scheme proposed is only for the purpose of an efficient, adequate, economical and properly co-ordinated bus transport service and should relate only to that purpose and that therefore, the enquiry contemplated under section 68-D, though assimilated to a judicial procedure, does not make the approval of the scheme any the less an administrative act. To put it shortly, his contention is that the Government is discharging only an administrative duty in approving the scheme in public interest and no rights of the parties are involved in the process. There is some plausibility and attraction in the argument, but we cannot accept either the premises or the conclusions. The scheme proposed may exclude persons, who have proprietary rights in a route or routes. As we have pointed out purpose must be distinguished from the particulars in the scheme. The scheme propounded may exclude persons from a route or routes and the affected party is given a remedy to apply to the Government and the Government is enjoined to decide the dispute between the contesting parties. The statute clearly, therefore, imposes a duty upon the Government to act judicially. Even if the grounds of attack against the scheme are confined only to the purpose mentioned in section 68-C—we cannot agree with this contention—the position will not be different, for, even in that case there is a dispute between the State Transport Undertaking and the person excluded in respect of the scheme, though the objections are limited to the purpose of

the scheme. In either view the said two provisions, sections 68-C and 68-D, comply with the three criteria of a judicial act laid down by this Court.

Support is sought to be drawn for this contention from the decision of the House of Lords in *Franklin* v. *Minister of Town and Country Planning*[1]. As strong reliance is placed on this decision, it is necessary to consider the same in some detail. The facts of that case are : On August 3, 1946, the respondent, Lewis Silkin, as Minister of Town and Country Planning, prepared the draft Stevenage New Town (Designation) Order, 1946, under paragraph I of Schedule I to the New Towns Act, 1946, and on or about August 6, 1946, he caused the same to be published and notices to be given as prescribed by paragraph 2 of Schedule I to the Act. Thereafter objections were received from a number of persons, including the appellants. Accordingly, the respondent instructed Mr. Arnold Morris, an Inspector of the Ministry of Town and Country Planning, to hold a public local inquiry as prescribed by paragraph 3 of the said Schedule. Mr. Morris held the inquiry at the Town Hall, Stevenage, on October 7 and 8, 1946, and on October 25, made a report to the respondent in which he set out a summary of the submissions made and the evidence given by and on behalf of the objectors and attached thereto a complete transcript of the proceedings, which began with an opening statement by Mr. Morris giving a brief recapitulation of the reasons that had led to the designation of Stevenage as the site of a New Town. On November 11, 1946, the respondent made the order in terms of paragraph 4 of Schedule I to the Act. The appellants applied to the High Court to have the order quashed. It was contended, *inter alia*, that the said order was not within the powers of the New Towns Act, 1946, or alternatively, that the requirements of the said Act have not been complied with ; that the Minister who made the order had stated, before the Bill was made into law, that he would make the said order, and therefore he was biassed in any consideration of the said objections. The House of Lords held that the respondents functions under the Act were only administrative and that he had complied with the provisions of the statute. In that view, the order of the Court of Appeal dismissing the application filed by the appellants was confirmed. Lord Thankerton in his speech at page 102, observed thus :

"In my opinion, no judicial, or quasi-judicial, duty was imposed on the respondent, and any reference to judicial duty, or bias, is irrelevant in the present case. The respondent's duties under section 1 of the Act and Scheudle I thereto are, in my opinion, purely administrative, but the Act prescribes certain methods of or steps in, discharge of that duty. .... It seems clear also, that the purpose of inviting objections, and, where they are not withdrawn, of having a public inquiry, to be held by someone other than the respondent, to whom that person reports, was for the further information of the respondent, in order to the final consideration of the soundness of the scheme of the designation..................... I am of opinion that no judicial duty is laid on the respondent in discharge of these statutory duties, and that the only question is whether he has complied with the statutory directions to appoint a person to hold the public inquiry, and to consider that person's report."

At first sight the facts of this case may appear to have some analogy to those in the present case, but on a deeper scrutiny of the facts and the provisions of the New Towns Act, 1946, and Chapter IV-A of the Act, they disclose essential differences in fundamentals. Under the New Towns Act, 1946, the following steps for developing a new town have been laid down : (1) It is left to the Minister's subjective satisfaction, after consulting local authorities, who appear to him to be concerned , to make an order designating a particular area as the site of the proposed new town ; (2) when he proposes to make an order, he prepares a draft of that order giving the necessary particulars and publishes it in the London Gazette calling for objections to the proposed order within a prescribed time ; (3) if any objection is made to the proposed order, he shall cause a public local enquiry to be held and shall consider the report of the person by whom the enquiry was held ; and (4) any person desiring to challenge the validity of that order may apply to the High Court and he can get that order set aside only if he satisfies the Court that the order is not within the powers of that Act or that his interests have been substantially prejudiced by any requirements of that Act not having

1. L.R. (1948) A.C. 87.

been complied with. The steps to be taken for nationalising the Road Transport under the Act are as follows : (1) The State Transport Undertaking, which is a statutory authority under the Act, proposes a scheme ; (2) the scheme may provide that the road transport services should be run or operated by the State Transport Undertaking to the exclusion of a peron or persons ; (3) any person affected may file objections before the Government ; (4) the Government following the rules of judicial procedure decides the dispute between the undertaking and the person or persons affected ; (5) the dispute is not necessarily confined only to the question whether the statutory requirements have been complied with, but may also relate to the question whether a particular person or persons should not be excluded ; and (6) a personal hearing should be given to both the parties by the Government.

A comparison of the procedural steps under both the Acts brings out in bold relief the nature of the enquiries contemplated under the two statutes. There, there is no *lis*, no personal hearing and even the public enquiry contemplated by a third party is presumably confined to the question of statutory requirements, or at any rate was for eliciting further information for the Minister. Here, there is a clear dispute between the two parties. The dispute comprehends not only objections raised on public grounds, but also in vindication of private rights and it is required to be decided by the State Government after giving a personal hearing and following the rules of judicial procedure. Though there may be some justification for holding, on the facts of the case before the House of Lords that that Act did not contemplate a judicial act—on that question we do not propose to express our opinion—there is absolutely none for holding in the present case that the Government is not performing a judicial act. Robson in 'Justice and Administrative Law', commenting upon the aforesaid decision, makes the following observation at page 533 :

> "It should have been obvious from a cursory glance at the New Towns Act that the rules of natural justice could not apply to the Minister's action in making an order, for the simple reason that the initiative lies wholly with him. His role is not to consider whether an order made by a local authority should be confirmed, nor does he have to determine a controversy between a public authority and private interests. The responsibility of seeing that the intention of Parliament is carried out is placed on him."

The aforesaid observations explain the principle underlying that decision and that principle cannot have any application to the facts of this case. In 'Principles of Administrative Law' by Griffth and Street, the following comment is found on the aforesaid decision : After considering the provisions of section 1 of the New Towns Act, 1946, the authors say—

> "Like the town-planning legislation, this differs from the Housing Acts in that the Minister is a party throughout. Further, the Minister is not statutorily required to consider the objections. It is obvious, as the statute itself states, that the creation of new towns is of national interest."

At page 176, the authors proceed to state :

> "Lord Thankerton did not analyse the meanings of 'judicial' and 'administrative' nor did he specify the particular factors which motivated his classification. It is permissible to conclude that he looked at the Act as a whole, applying a theory of interpretation similar to the rule in *Hoydom's Case*[1].

At page 178, they conclude thus :

> "It is submitted, however, that the thoroughness with which the Couts analyased the statutes in the *Errington, Robinson, Johnson and Franklin Cases* and the emphasis which they have placed on the fact that their decisions have been based solely on the statute under consideration makes such an approach inevitable."

It is therefore clear that *Franklin's Case*[2], is based upon the interpretation of the provisions of that Act and particularly on the ground that the object of the enquiry is to further inform the mind of the Minister and not to consider any issue between the Minister and the objectors. The decision in that case is not of any help to decide the present case, which turns upon the construction of the provisions of the Act. For the aforesaid reasons, we hold that the State Government's order under section 68-D is a judicial act.

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1. (1584) 3 Co. Rep. 7-a, 7-b).
2. L.R. (1948) A.C. 87.

The next question is whether the State Government disposed of the objections of the petitioners judicially in the manner prescribed by the Act. It is said that under the Act and rules framed thereunder, the State Government should hear the dispute, but in this case the Secretary in charge of the Transport Department, who is not the State Government, gave the hearing. The State Government is an impersonal body and it can only function through the machinery and in the manner prescribed by law. Clause (60) of section 2 of the General Clauses Act, 1897, defines ' State Government ' as respects anything done or to be done after the commencement of the Constitution (VII Amendment) Act, 1956, to mean, in a State the Governor, and in a Union Territory, the Central Government. Under Article 154 (1) of the Constitution

' the executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution'.

Article 163 enacts that:

' there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion '.

Article 166 (1) enjoins that:

' all executive action of the Government of a State shall be expressed to be taken in the name of the Governor '.

Sub-clause (2) of that Article says that : ' orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor '.

And under sub-clause (3)

' the Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion '.

In exercise of the powers conferred by clauses (2) and (3) of Article 166 of the Constitution, the Government of Madras made rules styled as ' The Madras Government Business Rules and Secretariat Instructions '. Rule 9 thereof prescribes that without prejudice to the provisions of rule 7, the Minister in charge of a department shall be primarily responsible for the disposal of the business appertaining to that department. Rule 21 enacts that except as otherwise provided by any other Rule, cases shall ordinarily be disposed of by or under the authority of the Minister in charge who may, by means of standing orders, give such directions as he thinks fit for the disposal of cases in the department. Copies of such standing orders shall be sent to the Governor and the Chief Minister. Rule 11 says that

' all orders or instruments made or executed by or on behalf of the Government of the State shall be expressed to be made or executed in the name of the Governor '.

Under rule 12:

' every order or instrument of the Government of the State shall be signed either by a Secretary, an Additional Secretary, a Joint Secretary, a Draftsman, a Deputy- Secretary, an Under Secretary or an Assistant Secretary to the Government of the State or such other officers as may be specially empowered in that behalf and such signature shall be deemed to be the proper authentication of such order or instrument.'

After the formation of the Andhra State on October 3, 1953, the rules made by the Governor of Madras, under the provisions of the States Reorganization Act, continue to be rules of the Andhra State till they are amended in accordance with such law. The Governor of Andhra State, in exercise of the powers conferred by clauses (2) and (3) of Article 166 of the Constitution, directed that until other provisions are made in this regard,

' the business of the Government of Andhra be transacted in accordance with the Madras Government Business Rules and Secretariat Instructions in force on the first day of October, 1953 '.

On October 26, 1956, after the formation of the Andhra Pradesh State, as the Andhra Pradesh was not a new State but a continuation of the Andhra State, though

there is change in its name, the business rules of the Andhra State continue to govern the Secretariat of the Andhra Pradesh Government. The effect of the aforesaid provisions may be stated thus: A State Government means the Governor; the executive power of the State vests in the Governor; it is exercised by him directly or by officers subordinate to him in accordance with the provisions of the Constitution; the Ministers headed by the Chief Minister advise him in the exercise of his functions; the Governor made rules enabling the Minister in charge of particular department to dispose of cases before him and also authorizing him, by means of standing orders, to give such directions as he thinks fit for the disposal of the cases in the department. Pursuant to the rule, the record discloses, the Chief Minister, who was in charge of Transport, had made an order directing the Secretary to Government, Home Department, to hear the objections filed against the scheme proposed by the State Transport Authority.

The aforesaid machinery evolved by the rules for the disposal of cases by the State Government has been followed in this case. The petitioners and others filed objections to the proposed scheme before the Secretary to the Government Transport Department. He gave a personal hearing to the parties some of them appeared in person and others by representatives; the entire material recorded by him was placed before the Chief Minister in charge of Transport, who made his order approving the scheme; and the order was issued in the name of the Governor, authenticated by the Secretary in charge of the Transport Department. It may therefore be said that the State Government gave the hearing to the petitioners in the manner prescribed by the rules made by the Governor.

At this stage, the argument hinted at but not seriously pressed, may be noticed. The Rules the Governor is authorised to make, the argument proceeds, are only to regulate the acts of the Governor or his subordinates in discharge of the executive power of the State Government, and therefore will not govern the quasi-judicia functions entrusted to it. There is a fallacy in this argument. The concept of a quasi-judicial act implies that the act is not wholly judicial; it describes only a duty cast on the executive body or authority to conform to norms of judicial procedure in performing some acts in exercise of its excutive power. The procedural rules made by the Governor for the convenient transaction of business of the State Government apply also to quasi-judicial acts, provided those Rules conform to the principles of judicial procedure.

The mode of performing quasi-judicial acts by administrative Tribunals has been the subject of judicial decisions in England as well as in India. The House of Lords in *Local Government Board* v. *Arlidge*[1], in the context of the Housing, Town Planning, etc., Act, 1909, made the following observations at page 132:

> "My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a Tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such Tribunal must be the same".

In *New Prakash Transport Co., Ltd.* v. *New Swarna Transport Co., Ltd.*[2], this Court reviewed the case-law on the subject and came to the conclusion that the rules of natural justice vary with varying constitutions of statutory bodies, and the rules prescribed by the Legislature under which they have to act, and the question whether in a particular case they have been contravened must be judged not by any preconceived notion of what they may be but in the light of the provisions of the relevant Act. This Court re-affirmed the principle in *Nagendra Nath Bora and another* v. *Commissioner of Hills Division*[3].

With this background we shall proceed to consider the validity of the three alleged deviations of the State Government from the fundamental judicial pro-

1. L.R. (1915) A.C. 120.
2. (1957) S.C.J. 236: A.I.R. 1957 S.C. 232.
3. (1958) S.C.J. 798: A.I.R. 1958 S.C. 398.

cedure. In the present case, the officer who received the objections of the parties and heard them personally or through the irrepresentatives, was the Secretary of the Transport Department. Under the 'Madras Government Business Rules and Secretariat Instructions' made by the Governor under Article 166 of the Constitution, the Secretary of a department is its head. One of the parties to the dispute before the State Government was the Transport Department functioning as a statutory authority under the Act. The head of that department received the objections, heard the parties, recorded the entire proceedings and presumably discussed the matter with the Chief Minister before the latter approved the scheme. Though the formal orders were made by the Chief Minister, in effect and substance, the enquiry was conducted and personal hearing was given by one of the parties to the dispute itself. It is one of the fundamental principles of judicial procedure that the person or persons who are entrusted with the duty of hearing a case judicially should be those who have no personal bias in the matter. In *Ranger* v. *Great Western Ry. Co.*[1], Lord Cranworth, L.C., says :

> "A Judge ought to be, and is supposed to be, indifferent between the parties. He has, or if supposed to have, no bias inducing him to lean to the one side rather than to the other. In ordinary cases it is just ground of exception to a Judge that he is not indifferent, and the fact that he is himself a party, or interested as a party, affords the strongest proof that he cannot be indifferent."

In *Rex* v. *Sussex Justices Ex parte McCarthy*[2], Lord Hewart, C.J., observed :

> "It is said, and, no doubt, truly, that when that gentleman retired in the usual way with the justices, taking with him the notes of the evidence in case the justices might desire to consult him, the justices came to a conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way. But while that is so, a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered ; the question is whether he was so related to the case in its civil aspects as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done, but upon what might appear to be done."

This was followed in *Rex* v. *Essex Justices* Ex Parte *Perkins*[3]. In *Franklin's Case*[4] though on a construction of the provisions of that Act under consideration in that case it was held that the Minister was not acting judicially in discharging his duties, his Lordship accepted the aforesaid principle and expressed his view on the doctrine of 'bias' thus, at page 103 :

> "My Lords, I could wish that the use of the words 'bias' should be confined to its proper sphere. Its proper significance, in my opinion, is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator. The reason for this clearly is that, having to adjudicate as between two or more parties, he must come to his adjudication with an independent mind without any inclination or bias towards one side or other in the dispute."

The aforesaid decisions accept the fundamental principle of natural justice that in the case of quasi-judicial proceedings, the authority empowered to decide the dispute between opposing parties must be one without bias towards one side or other in the dispute. It is also a matter of fundamental importance that a person interested in one party or the other should not, even formally, take part in the proceedings though in fact he does not influence the mind of the person, who finally decides the case. This is on the principle that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The hearing given by the Secretary, Transport Department, certainly offends the said principle of natural justice and the proceeding and the hearing given, in violation of that principle are bad.

The second objection is that while the Act and the Rules framed thereunder impose a duty on the State Government to give a personal hearing, the procedure prescribed by the Rules impose a duty on the Secretary to hear and the Chief Minis-

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1. (1854) 5 H.L.C. 72, 89 ; 10 E.R. 824, 827.
2. L.R. (1924) 1 K.B. 256, 258.
3. L.R. (1927) 2 K.B. 475.
4. L.R. (1948) A.C. 87.

ter to decide. This divided responsibility is destructive of the concept of judicial hearing. Such a procedure defeats the object of personal hearing. Personal hearing enables the authority concerned to watch the demeanour of the witnesses and clear-up his doubts during the course of the arguments, and the party appearing to persuade the authority by reasoned argument to accept his point of view. If one person hears and another decides, then personal hearing becomes an empty formality. We therefore hold that the said procedure followed in this case also offends another basic principle of judicial procedure.

The learned counsel further contends that the mind of the State Government was foreclosed before the hearing was given and therefore no real enquiry was held by it as contemplated by the Act. This argument is based upon the report published on 27th December, 1957, in the DECCAN CHRONICLE and GOLCONDA PATRIKA. Therein it was stated under date December 26, as follows :

> "The Chief Secretary, Mr. M. P. Pai, told pressmen to-day that the Government has already taken a decision to nationalize the road transport in Krishna District and some routes had been chosen. The Guntur-Vijayawada route also comes under the nationalisation scheme. About 65 buses would be plying on these routes."

The Chief Secretary was giving this information on December 26, 1957, even before the enquiry was commenced. On the basis of this publication, it is contended, that the Government had already taken a decision to nationalize the road transport before the scheme was approved by the Government and that the entire procedure was put through to implement the decision already taken to meet the requirements of the technicalities of law. In the counter-affidavit filed by the first respondent it is stated that the scheme was published in the Andhra Pradesh Gazette, dated 24th December, 1957 and that the alleged statement only referred to the said proposal under section 68-C of the Motor Vehicles Act. Though the wording of the information published speaks of the decision of the Government, the Chief Secretary obviously must have been referring to the contents of the notification published two days earlier, on 24th December, 1957. We cannot from this publication in the newspapers come to the conclusion that the Government having finally decided to reject all possible objections, went through a farce of an enquiry. We therefore hold, for the first two reasons, that the quasi-judicial enquiry held by the State Government was vitiated by the violation of the aforesaid fundamental principles of natural justice.

The last argument of the learned counsel for the petitioners is that the Road Transport Corporation, *i.e.*, the first respondent, cannot implement the scheme proposed by the defunct State Transport Undertaking. Some of the relevant facts are as follows : The State Transport Undertaking published the scheme in the Andhra Pradesh Gazette, dated November 14, 1957. It also appeared through its representative, the General Manager, who made his representation to the Secretary of the Transport Department on 26th December, 1957. The State Government approved of the scheme on 7th January, 1958, and the approved scheme was published in the Andhra Pradesh Gazette, dated 9th January, 1958 and it was directed to come into force with effect from 10th January, 1958. The Government of Andhra Pradesh established a Road Transport Corporation under the Road Transport Corporations Act, 1950 (Act LXIV of 1950), for the State of Andhra Pradesh, with effect from 11th January, 1958. The State Government transferred the business of the Road Transport Department to the said Corporation for management. Thereaftrer, the said Corporation was taking subsequent steps to implement the scheme. The argument is that the Road Transport Corporation has no power under the Road Transport Corporations Act to take over the business of the State Transport Undertaking and to implement the scheme initiated by that undertaking. The said Corporation admittedly comes under the definition of 'State Transport Authority' under the Act. But the question is whether the said Corporation is also a successor to the State Transport Authority that initiated the scheme. It would certainly be the successor if the Corporation was legally entrusted with the duty of carrying on the business the Road Transport Department was doing before.

On January 9, 1958, in exercise of the powers conferred by section 3 of the Road Transport Corporations Act, 1950, the Governor of Andhra Pradesh established with effect from January 11, 1958, a Road Transport Corporation called the Andhra Pradesh Road Transport Corporation for the State of Andhra Pradesh. In exercise of the power conferred by section 34 of the Road Transport Corporation Act, 1950, the Governor of Andhra Pradesh made an order, dated 11th January, 1958, for the following administrative arrangements to come into force :

"(1) The Andhra Pradesh Road Transport Corporation (hereinafter referred to as the Corporation) shall take over the management of the existing Road Transport Department of the Government of Andhra Pradesh.

(2) All land and all stores, articles and other goods of the Road Transport Department shall pass to the Corporation.

(3) (a) Subject to the provisions of sub-paragraphs (b) and (c), all the assets and liabilities of the Road Transport Department shall pass to the Corporation. ...."

The other clauses need not be read as they are only consequential to the aforesaid clauses. It is therefore clear from the said order that the Government entrusted the management of the Road Transport Department to the Road Transport Corporation and directed the transfer of all assets and liabilities to the said Corporation. The effect of the said order is that the State Corporation carries on the Road Transport business in the place of the State Transport Department which was functioning as the State Transport Undertaking under the Act before the said order. If there was no legal impediment in the Government transferring the business carried on by one of its departments and its assets to the Corporation, the Corporation would be a successor to the pre-existing State Transport Undertaking. The petitioners contest the position that the Government has any such power under section 34 of the Road Transport Corporations Act, 1950. Section 34 reads :

"(1) The State Government may, after consultation with a Corporation established by such Government, give to the Corporation general instructions to be followed by the Corporation, and such instructions may include directions relating to the recruitment, conditions of service and training of its employees, wages to be paid to the employees, reserves to be maintained by it and disposal of its profits and stocks.

(2) In the exercise of its powers and performance of its duties under this Act, the Corporation shall not depart from any general instructions issued under sub-section (1) except with the previous permission of the State Government."

The Road Transport Corporation was constituted for extending and improving the facilities of the road transport in the Andhra Pradesh area. The Government transferred the undertaking and its asiets to that Corporation and gave it directions under section 34 of the Road Transport Corporations Act, 1950, to take over the management of the said undertaing. The fact that under the Road Transport Corporations Act the Corpundertn can acquire an undertaking after paying compensation is not of much relevancy, for, in this case, the Corporation does not purport to acquire any transport undertaking of the petitioners. It has not been brought to our notice that the said direction is inconsistent with any of the provisions of the Road Transport Corporations Act, 1950. We, therefore, hold that the first respondent is the successor to the State Transport Undertaking which proposed the scheme and as admittedly it satisfied the requirements of the definition of 'Road Transport Authority' under the Act, it is within its rights in implementing the scheme approved by the Government.

In the result, for the reason that the State Government did not make the enquiry consistent with the principles of natural justice in approving the scheme, the order approving the schemes is hereby quashed and a direction issued to the first respondent to forbear from taking over any of the routes in which the petitioners are engaged in transport business. This judgment will not preclude the State Government from making the necessary enquiry in regard to the objections filed by the petitioners in accordance with law. The petitioners will have liberty to file additional objections, if any. As the petitioners have failed on substantive points in the case, the parties are directed to bear their own costs.

Wanchoo, J.—This petition under Article 32 of the Constitution challenges the scheme of road transport introduced in the Krishna district of Andhra Pradesh. The petitioners raise two main contentions, namely, (1) that the provisions of Chapter IV-A of the Motor Vehicles Act, 1939, violate their fundamental rights guaranteed under the Constitution, and (2) that the scheme introduced is *ultra vires* Chapter IV-A.

I have had the advantage of reading the judgment prepared by my brother Subba Rao, J. I agree with what he has said on the first contention and therefore do not propose to repeat the facts and the reasons given by him. I have, however, been unable, with utmost respect, to persuade myself to agree fully with what has been said on the second contention. I, therefore, proceed to deal with that only.

The second contention of the petitioners is that the scheme of road transport which is sought to be put into effect, is *ultra vires* Chapter IV-A of the Motor Vehicles Act (IV of 1939), (hereinafter called the Act), inasmuch as the provisions of that Chapter have not been strictly followed. Before I deal with the contentions of the petitioners in this matter, I may indicate briefly the steps required to be taken before a scheme of road transport is finalised under Chapter IV-A of the Act. The first step is the preparation of the scheme under section 68-C, which lays down that where any State Transport Undertaking is of opinion that for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport service, it is necessary in the public interest that road transport services in general or any particular class of such service in relation to any area or route or portion thereof should be run and operated by the State Transport Undertaking, whether to the exclusion, complete or partial, of other persons or otherwise, the State Transport Undertaking may prepare a scheme for the purpose. After the scheme is prepared, it has to be published in the official Gazette and also in such other manner as the State Government may direct. The next step is that any person affected by the scheme published under section 68-C may, within thirty days from the date of publication, file objections thereto before the State Government; (section 68-D (1)). The third step is that the State Government has to consider the objections and after giving an opportunity to the objectors or their representatives and the representatives of the State Transport Undertaking to be heard in the matter, to approve or modify the scheme; (section 68-D (2).) Finally, the scheme as approved or modified is published in the Official Gazette as the approved scheme; (section 68-D (3).) Then comes the provisions for putting this approved scheme into effect. Section 68-F provides that the Regional Transport Authority shall thereupon issue permits to the State Transport Undertaking on its application in pursuance of the approved scheme. The Regional Transport Authority is also given power to cancel or modify any existing permit or refuse to renew any existing permit for this purpose. Section 68-G provides for compensation where any existing permit is cancelled or its terms are modified.

The main attack of the petitioners is that sections 68-C and 68-D were not complied with. The particulars of the attack may be summarised as below :—

(1) There was no State Transport Undertaking in existence which could have published the scheme; (68-C)

(2) Even if a State Transport Undertaking was there, it did not form an opinion as required by section 68-C and in particular, the General Manager, who acted for the State Transport Undertaking, had no authority to do so;

(3) Section 68-D (2) contemplates a hearing by the State Government of the objections filed. There was no such hearing, as the Home Secretary in charge of Transport Department, who heard the objectors must be deemed to be one of the parties who have to be heard by the State Government, and in any case, the hearing by the Secretary was no hearing by the State Government.

(4) There was no real hearing at all and no genuine consideration of the objections by the State Government as the issue had already been prejudged, (*vide* speech of the Chief Secretary on the 26th of December, 1957); and

(5) The scheme could not be enforced by the Road Transport Corporation, which replaced the Road Transport Department soon after the scheme had been approved by the State Government.

It is necessary in order to appreciate and decide the point raised on behalf of the petitioners to mention briefly the facts relating to the preparation of the scheme and subsequent steps taken for its approval and enforcement. The scheme was published on November 14, 1957, under the authority of Shri Guru Pershad, General Manager of the State Transport Undertaking, Andhra Pradesh Road Transport. Chapter IV-A of the Act had come into force from the 15th of February, 1957. Before that, Hyderabad State, as it then was, had passed Act XLV of 1956, amending the Motor Vehicles Act locally and incorporating in it provisions similar to the present Chapter IV-A. Under the Hyderabad Act, the State Transport Undertaking was defined as the Road Transport Department of the State providing road transport services. When the Hyderabad State came to end and what was known as the Telengana area of that State was merged in the State of Andhra Pradesh, the Road Transport Department of Andhra Pradesh took over the road transport services in the Telengana area which were being run by the former Hyderabad State. The present scheme was published, as already stated, on the 14th of November, 1957, by Shri Guru Pershad on behalf of the Road Transport Department of Andhra Pradesh. The objections to the scheme were received by the Secretary to Government in charge of the Road Transport Department, and the objectors were heard by the Home Secretary in charge of the Transport Department on the 26th and 27th of December, 1957. The scheme was finally approved by the Governor of Andhra Prasdesh on the 7th of January, 1958, and was to come into force from the 10th of January, 1958. The approved scheme was published in the Gazette on January 9, 1958. In the meantime, the Government of Andhra Pradesh decided to establish a Road Transport Corporation under the Road Transport Corporations Act, No. LXIV of 1950, for the State of Andhra Pradesh. This decision was published on the 20th December, 1957 and the Road Transport Corporation was to come into existence from the 11th of January, 1958. It was to take over the business of the Road Transport Department of the State. The members of the Road Transport Corporation were appointed on the 9th of January, 1958, and the Corporation was established with effect from the 11th January, 1958. It was this Corporation, which took over the duty of implementing the approved scheme, which was published on the 9th January, 1958, and was to come into effect from the 10th of January, 1958. The steps necessary under sections 68-F, 68-G and 68-H of the Act to put the scheme into force were taken by this Corporation.

Re. (1) : The argument of the petitioners under this head is put thus : There was a State Transport Undertaking under Hyderabad Act, which was operating in the present Telengana area of Andhra Pradesh. This was the Road Transport Department of the Hyderabad State, which became the statutory body under the Hyderabad Act. When, however, the Hyderabad State came to end and the Telengana area was merged in Andhra Pradesh on the 1st of November, 1956, the State Transport Undertaking of the Hyderabad State continued to function as such for the Telengana area of Andhra Pradesh. There was no extension of the Hyderabad Act to the rest of Andhra Pradesh, and the present scheme relates to Krishna District which is not in the Telengana area ; consequently, it was not open to the State Transport Undertaking which was existing under the Hyderabad Act to frame this scheme for an area which was not in Telengana. It was also urged that no State Transport Undertaking was formed as such after the coming into force of Chapter IV-A of the Act in February, 1957. I am of the opinion that there is no force in this argument. It is true that under the Hyderabad Act, the State Transport Undertaking was defined as " the Road Transport Department of the State providing road transport service". When Hyderabad State came to end on the 1st of November, 1956, the Road Transport Department of Andhra Pradesh became the State Transport Undertaking within the meaning of the Hyderabad Act, though, as that Act was in force only in the Telengana area, road transport services could only be run in that area. When, however, Chapter IV-A of the Act came into force from the 15th of

February, 1957, and applied to the whole of the State of Andhra Pradesh, the Hyderabad Act must be deemed to have been repealed by necessary implication, as Chapter IV-A of the Act covered exactly the same field as was covered by the Hyderabad Act. On the 15th of February, 1957, there was only Road Transport Department of Andhra Pradesh, which was in existence and which was providing transport services in certain areas of the State. Now, under section 68-A, a State transport undertaking is defined

> "any undertaking providing road transport service, where such undertaking is carried on by the Central Government or the State Government ...."

The Road Transport Department of Andhra Pradesh was obviously an undertaking providing road transport service though only in a part of the State, and was carried on by the State Government of Andhra Pradesh. Therefore, the Road Transport Department of Andhra Pradesh became the State Transport Undertaking under the definition in section 68-A. The fact that this undertaking which came into existence by virtue of the definition on the 15th of February, 1957, was at that time providing road transport services only in a part of the State, would not make it any the less a State Transport Undertaking within the meaning of that term and there is nothing in Chapter IV-A, which precludes a State Transport Undertaking, which is for the time being providing transport services in a part of the State, from extending its activities and framing a scheme for other parts of the State. I am, therefore, of opinion that a State Transport Undertaking was in existence in November, 1957, when the scheme was prepared and published, and it was the Road Transport Department of Andhra Pradesh.

Re. (2) : The contentions on this head are twofold. In the first place, it is urged that the General Manager, who acted for the State Transport Undertaking had no authority to do so on its behalf. This is a question of fact and should have been specifically raised in the petition. All that, however, is said about the authority of Shri Guru Pershad is to be found in paragraph 11 (*e*) of the petition in these words :

> "Mr. Guru Pershad was the General Manager of the Road Transport Department of the erstwhile Hyderabad State. He was never appointed as Manager of the State Transport Undertaking of Andhra Pradesh, and therefore, he has no legal authority whatever to publish a scheme".

Now, it is obvious that this objection was only confined to one point, namely, that Shri Guru Pershad had no authority to act for the State Transport Undertaking of Andhra Pradesh, as he was never appointed as manager of that undertaking. It was not the case of the petitioners that even if he had been appointed as Manager of the Andhra Pradesh State Transport Undertaking, he would have no authority to frame and publish a scheme on behalf of that undertaking. It appears that Shri Guru Pershad, who was the Manager of the road transport services when they were run by the former Hyderabad State, continued to be such after the Telengana area of the Hyderabad State was merged in Andhra Pradesh. It is unthinkable that Shri Guru Pershad should have issued a notification in the Gazette on the 14th of November, 1957, styling himself as "General Manager, State Transport Undertaking, Andhra Pradesh Road Transport", if he was not in fact the General Manager of the Andhra Pradesh Road Transport . It must, therefore, be held that Shri Guru Pershad was the General Manager of the Andhra Pradesh Road Transport, and, therefore, of the State Transport Undertaking. His authority to publish the scheme, if he was the Manager of Andhra Pradesh State Transport Undertaking, has not been attacked. The scheme was published on the 14th of November, 1957, by Shri Guru Pershad as such Manager. The petitioners cannot at this stage be allowed to challenge his authority to do so, when they did not specifically raise this point in their petitions. When, therefore, he prepared and published the scheme, it must be held that he did so on behalf of the State Transport Undertaking.

The second part of this contention is that the notification of the 14th November, 1957, does not say that the State Transport Undertaking was of opinion that it was necessary in the public interest that the road transport services should be run and

operated by the State Transport Undertaking. The actual words used in the notification are these :—

"In exercise of the powers conferred by section 68-C of the Motor Vehicles Act, 1939, it is hereby proposed, for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport service in public interest, to operate the following transport service as per the particulars given below with effect from a date to be notified by the Government."

No doubt, the words " that the State Transport Undertaking is of opinion " are not expressly to be found in this notification ; but at the same time it is impossible that a proposal like this should be prepared and published on behalf of the State Transport Undertaking without its forming an opinion that it was necessary in the public interest to do so. I am of opinion that the State Transport Undertaking must have formed the opinion necessary under section 68-C before it published its proposal and invited objections to the same. There is no exact form of words provided for this purpose, and it would be quite in order to draw the inference from the words used in the notification that it was published after the State Transport Undertaking had formed the opinion necessary under section 68-C. In this connection, reference may be made to paragraph 2 of the counter-affidavit filed on behalf of the Andhra Pradesh State Road Transport Corporation, where it is said that the General Manager of the Andhra Pradesh Road Transport which was the State Transport Undertaking, was of opinion that the transport services in the Krishna district of Andhra Pradesh should be operated in the public interest by the Andhra Pradesh Road Transport. It was, however, urged on behalf of the petitioners that this only disclosed the opinion of the General Manager and not of the State Transport Undertaking ; but as I have already said above, the authority of the General Manager to speak on behalf of the State Transport Undertaking was never specifically challenged in the petition. There is, therefore, no force in this contention, and it must be rejected.

Re. (3) : This contention relates to the hearing by the State Government under section 68-D (2). In order to determine this question, it is necessary to consider whether the State Government, when it gives a hearing under section 68-D (2) is acting as a quasi-judicial tribunal or is merely performing administrative functions. If the State Government acts as a quasi-judicial tribunal certain considerations apply to the nature of the hearing granted ; if, on the other hand, the State Government acts administratively, certain other considerations apply in determining the propriety of the hearing in fact given in this case. The contention on behalf of the petitioners is that the hearing contemplated is as a quasi-judicial tribunal. The learned Attorney-General, on the other hand, contends that the State Government merely acts administratively when it gives a hearing under this provision. What constitutes a quasi-judicial act has been considered by this Court in *Province of Bombay* v. *Kusaldas S. Advani and others*[1]. The principle has been summarised by Das, J., (as he then was) at page 725, in these words :

"The principles, as I apprehend them are :

(i) that if a statute empowers an authority, not being a Court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other, there is a *lis* and *prima facie* and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act ; and

(ii) that if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially.

In other words, while the presence of two parties besides the deciding authority will *prima facie* and in the absence of any other factor impose upon the authority the duty to act judicially, the absence of two such parties is not decisive in taking the act of the authority out of the category of quasi-judicial act if the authority is nevertheless required by the statute to act judicially."

Now, it may be mentioned that the statute is not likely to provide in so many words that the authority giving the hearing is required to act judicially ; that can only be inferred from the express provisions of the statute. In the present case, it

1. (1950) 2 M.L.J. 703 : (1950) S.C.J. 451 : 1950 S.C.R. 521.

is urged by Mr. Nambiar appearing for the petitioners that there were two parties before the State Government, which was the deciding authority under section 68-D (2), namely, the objectors and the representatives of the State Transport Undertaking. Therefore, according to him, *prima facie* there would be a duty to act judically and there is no other factor which would take away the inference to be deduced from the presence of two parties before the State Government, which has to decide the matter. Whether there is any other factor will, however, depend upon the circumstances of each case, and the nature of the matter under hearing and the scope of the hearing. The learned Attorney-General contends that if one looks at the nature of the matter to be heard and considers the scope of the hearing before the State Government in this case the only conclusion possible is that the State Government acts administratively when it gives a hearing under section 68 (2).

What then is the nature of the hearing before the State Government? Article 19 (6) (ii) is of help in this connection. It provides that nothing in sub-clause (*g*) of Article 19 (1), which deals among other things with the right to carry on trade or business shall prevent the State from making any law relating to the carrying on by the State or by a corporation owned or controlled by the State, of any trade, or business, whether to the exclusion, complete or partial, of citizens or otherwise. Chapter IV-A has been inserted in the Act to carry out this purpose, so that the State may operate transport services to the exclusion, complete or partial, of citizens. The scheme which has been published provides that there will be a complete exclusion of citizens when the scheme is enforced in the area to which it relates. Now, the question is whether the exclusion is of citizens as a whole is also an issue to be decided by the State Government when it hears objections. Mr. Nambiar submits that the most important thing for the State Government to decide is whether there should be complete exclusion of citizens on the enforcement of the scheme. The learned Attorney-General on the other hand contends that all that the State Govern- has to do is to see whether the scheme published is in the interest of the public and also whether it will provide an efficient, adequate, economical and properly co-ordinated road transport service. The argument continues that if the State Government comes to that conclusion, the complete exclusion which the scheme provides *ipso facto* follows, and the State Government has not to decide the matter of exclusion as a separate issue. In other words, the argument is that the State Government is not to decide between the competing claims of citizens providing transport privately and the State Transport Undertaking providing transport to the exclusion of citizens, and there is, therefore, no real *lis* in this case. It is also pointed out that objection can not only be filed by the bus operators of that area who are to be excluded but also by anybody who is affected by the scheme, including the members of the travelling public. Giving my best consideration to the arguments on either side on this aspect of the matter, I have come to the conclusion that the scope of the hearing before the State Government is of a limited character, though the decision may affect citizens providing transport, the question whether private citizens should or should not be allowed to provide transport is really not a matter in issue before the State Government. What is in dispute before the State Government is only whether the scheme that is proposed by the State Transport Undertaking is an efficient, adequate, economical and properly co-ordinated scheme for road transport service and whether it is in the interest of the public. If the State Government comes to the conclusion that it is so, the complete exclusion proposed automatically follows and the question of exclusion is not to be determined as separate issue as between the objectors and the State Transport Undertaking. It is true that the State Government has the right to modify the scheme and in so doing it may drop a part of the scheme; but here again it is not modifying the scheme because of any right of a private citizen to carry on road transport service in a particular area but because it considers that the scheme so far as that particular area is concerned is not efficient, adequate, economical or properly co-ordinated or in the public interest. Unless it comes to that conclusion with respect to any part of the area comprised in the scheme and modifies it, the consequence of complete exclusion *ipso facto* follows. What I wish to emphasise is that the State Government is not determining whether there

should be State monopoly or private enterprise when it is considering objections under section 68-D (2) ; it is only deciding whether the scheme put forward before it is such as can be approved with or without modifications within the four corners of the law laid down under section 68-C. If it comes to that conclusion, the complete or partial exclusion follows. If on the other hand it modifies any part of the scheme, exclusion fails to that extent. Considering, therefore, the nature and the scope of the hearing under section 68-D (2) it seems to me that there is really no *lis*. Evern though there may be two parties before the State Government at the hearing, there is no determination of the rights of the parties before it. The determination is only of the efficiency, etc. of the scheme proposed and whether it is in the public interest. Therefore, it cannot be said that the nature of the hearing in this case makes the State Government a quasi-judicial Tribunal and the decision a quasi-judicial act within the meaning of the principles laid down in *Advani's Case*[1].

I may in this connection refer to *Franklin* v. *Minister of Town and Country Planning*[2]. The facts there were these : Under the New Towns Act, 1946, the Minister prepared a draft order for a new town and and caused it to be published ; and notices were given to the persons affected. Thereafter objections were received from a number of persons who were the owners and occupiers of dwelling-houses and lands in the affected area. The Act provided that on receipts of the objections, an inspector was to hold a public local inquiry into the objections and make a report to the Minister. Thereupon, the Minister made the order under the Act. These proceedings, as provided by the Act, were taken with respect to a place called Stevenage in 1946 and the Minister passed the necessary order eventually. Some of the owners and occupiers of dwelling-houses and lands situate at Stevenage applied to the Court to have the order quashed, on the ground, among others, that the requirements of the said Act had not been complied with and the interests of the appellants had been substantially prejudiced. According to them, the New Towns Act, 1946 impliedly required that the objections of the appellants should be fairly and properly considered by the Minister and that the Minister should give fair and proper effect to the result of such consideration in deciding whether the said order should be made and that such implied requirements were not complied with. It was held in that case that the Minister of Town and Country Planning had no judicial or quasi-judicial duty imposed on him and the procedure followed was according to the requirements of the Act.

Now, substitute in the place of the New Towns Act, 1946, Chapter IV-A of the Act ; substitute in the place of the draft order of the Minister, the draft scheme of the State Transport Undertaking; and substitute in place of the final order, the final approval of the State Government after hearing the objections. It would seem, therefore, that the parallel between the present case and *Franklin's case*[2] is complete. There a draft order was published, followed by objections and an inquiry and hearing and a final order. Here also a draft scheme is published, followed by objections and hearing, and final approval. There the interest of persons occupying lands and houses in the area proposed to be affected by the order were involved. Here also the interests of the bus operators at least, if not also of the travelling public, are involved. In spite of that it was held that the Minister had no judicial or quasi-judicial duty imposed on him by the Act, and the reason was that he was merely considering whether the scheme should go through. Once he came to that conclusion after following the procedure provided in the Act, the effect on those occupying lands and dwelling-houses would follow, according to the provisions of the Act. Here also once the State Government decides that the scheme should be approved, the effect would be complete or partial exclusion of the bus operators of that area, as envisaged in the scheme. To my mind, therefore, the present case is parallel to *Franklin's case*[2] and on a parity of reasoning I would hold that the function of the State Government was administrative when it considered the objections under section 68-D (2) and

1. (1950) 2 M.L.J. 703 : (1950) S.C.J. 451 : 1950 S.C.R. 621.
2. L.R. (1948) A.C. 87.

not quasi-judicial. The only difference that I see between the two cases is that the New Towns Act provided specifically for hearing of the objections by an Inspector and not by the Minister while this is not so in the present case. I shall consider the effect of this later; but this has in my opinion, little, if any, bearing on the question whether the State Government was acting quasi-judicially when deciding objections under section 68-D (2).

I may also in this connexion refer to *Nagendra Nath Bora* v. *Commissioner of Hills Division*[1], where it was held by this Court that the question whether or not an administrative body or authority functions as purely administrative or in a quasi-judicial capacity, must be determined in each case on an examination of the relevant statute and rules framed thereunder. Similar was the view expressed by this Court in *Express Newspapers Ltd.* v. *The Union of India and others*[2], when considering the functions performed by a Wage Board, and it was observed that whether the Wage Board exercised judicial or quasi-judicial functions is to be determined by the relevant provisions of the statute incorporating it and it would be impossible to lay down any universal rule which would help in the determination of this question. Applying therefore, the principles laid down by this Court in these cases and taking into account the express provisions contained in Chapter IV-A and the Rules framed thereunder, the conclusion at which I arrive is that the hearing under section 68-D (2) was not before a quasi-judicial Tribunal and the decision was not a quasi-judicial act and the State Government was acting purely administratively.

Having reached this decision, let me see what actually happened in this case. The matter pertains to the Road Transport Department which was in charge of the Chief Minister. The Home Secretary works under the Chief Minister and was in charge of the Road Transport Department. The Chief Minister ordered, when the objections were put up before him, that the representation should be heard by the Home Secretary, and thereupon, the Home Secretary heard the objectors and a note of the hearing was placed before the Chief Minister for orders. The Chief Minister then passed the order approving the scheme. The main attack on this kind of hearing is two-fold. It is urged in the first place that rule 10 framed under Chapter IV-A of the Act provides that the objectors will be given an opportunity of being heard in person or through authorised representatives. It is said that in view of this rule it was not open to the Chief Minister to direct the Home Secretary to hear the objections when the decision was to be made by the Chief Minister. It is pointed out that in *Franklin's case*[3] there was a specific provision that an Inspector will hold an inquiry and hear the objections and make his report, and thereafter the Minister will pass the final order on the report of the Inspector. There is no such specific provision in the Act or the Rules in this case, and, therefore, the hearing by the Home Secretary in these circumstances cannot be said to be a hearing by the State Government or the Chief Minister who had to decide the objections. The learned Attorney-General relies in this connexion on the Rules of Business framed under Article 166 (3) of the Constitution which provides for the making of rules for the more convenient transaction of the business of the Government of the State, a copy of which was shown to us. It is said in paragraph 13 (1) of the counter-affidavit that these Rules do not provide for personal hearing; but it is open to the Minister to pass a standing order as he thinks fit for the disposal of business in his Ministry. Consequently, in exercise of this power, the Chief Minister passed an order that the Home Secretary should hear these representations in order to comply with the provision of Chapter IV-A and Rule 10, even though there is no provision in the Rules of Business for oral hearing by the Minister or the Secretary. It is urged by Mr. Namibar that the order passed by the Chief Minister in this case that the hearing should be given by the Home Secretary was not a standing order but an order in this particular case. That seems to me to be correct; but the question is whether, when an administrative hearing of this nature is being given under a rule which provides that the State Government should give a hearing to objectors, it is necessary

1. (1958) S.C.J. 798 : A.I.R. 1958 S.C. 398.
2. (1958) S.C.J. 1113: A.I.R. 1958 S.C. 578.
3. L.R. (1948) A.C. 87.

that the Minister who decides must also hear. It seems to me that where the hearing is administrative, it is not essential that the Minister must hear, so long as a hearing is given by an officer of the Government. I may in this connexion refer to Article 154 of the Constitution, which provides that the executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. This being an administrative hearing comes within the executive power of the State and there would be no infirmity if the Governor, who in view of the provisions of the General Clauses Act, is the State Government, authorised through the Chief Minister a subordinate officer to give the hearing. Reference in this connection may also be made to *Local Government Board* v. *Arlidge*[1], which dealt with the manner of hearing of an appeal by the Local Government Board under the Housing, Town Planning etc., Act, 1909. The following observations of Lord Haldane at page 132 are apposite in this context :—

"In the case of a Court of Law tradition in this country has prescribed certain principles to which in the main the procedure must conform. But what that procedure is to be in detail must depend on the nature of the Tribunal. In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary Court, to authorities whose functions are administrative and not in the ordinary sense judicial. Such a body as the local Government Board has the duty of enforcing obligations on the individual which are imposed in the interest of the community. Its character is that of an organization with executive functions. In this it resembles other great departments of the State. When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently."

These observations show that when one is dealing with a body like the State Government one has to take into account the procedure usually followed by the State Government in matters that come before it. In these circumstances if the Minister ordered, in the absence of specific rules on the point, that the hearing should be by the Secretary, he was, in my opinion, complying with the essential requirement, namely, that there should be an oral hearing by the State Government before the decision of the objections. The bifurcation of the function of hearing from the function of deciding cannot in the circumstances, when the hearing was administrative, be said to be improper or against rule 10, and was necessary in order that the Government may function efficiently. Therefore, I am of opinion that the hearing by the Secretary was sufficient compliance of rule 10, which required a personal hearing before the decision of the objections.

The second ground of attack under this head is that is any case the Home Secretary who was also in charge of the Road Transport Department was not the right person to hear the objections on the ground that the scheme was put forward by his department. Here again the fact that the hearing was of an administrative nature has to be borne in mind. Bearing that in mind and also considering that it was the Chief Minister who finally decided the matter and approved the scheme, it cannot be said that the Home Secretary in charge of the Transport Department was an improper person to give the hearing. After all, the scheme was put forward as a proposal. It was open to approval or modification after hearing the objections. The body which put forward the scheme was the State Transport Undertaking which was a limb of the Government. The Government has in a case of this kind to hear objections against a scheme prepared by one of its own limbs. In these circumstances, if the Head of the Department, namely, the Secretary hears the oral objections on a scheme prepared by some one in that department who would necessarily be under him, like the General Manager of the Road Transport Department, it does not follow that the Secretary is an improper person to give the hearing because he hears his subordinate who put forward the scheme also, along with the objectors. Further, the Secretary in this case is not the deciding authority which is the Chief Minister. He made notes of the hearing and conveyed the arguments to the Chief Minister, and as the matter was purely administrative, the procedure

1. L.R. (1915) A.C. 120, 132.

cannot be said to be improper. I am, therefore, of opinion that the contentions under this head must be rejected.

Re. (4). It is said that there was no real hearing at all and no genuine consideration of the objections as the issue had already been pre-judged, and reliance in this connexion is placed on the statement of the Chief Secretary, dated the 26th of December, 1957. It appears that the Chief Secretary said that the Government had already taken a decision to nationalise transport in Krishna District and some routes had been chosen. Learned Attorney-General contends that this only refers to the scheme which had already been published on the 14th of November, 1957. Mr. Nambiar on the other hand contends that it goes much further and shows that the Government had already made up their mind to nationalise road transport in Krishna District and therefore the hearing which the State Government gave the objectors to the scheme was a farce. Now, taking into account what I have said above about the scope of the hearing under section 68-D (2), it would be clear that there was no pre-judging of the issue so far as the scheme was concerned. It is true that the Chief Secretary said that there would be nationalisation in Krishna District, which meant of course complete exclusion of the private bus operators; but I have already said that the scope of the hearing under section 68-D (2) is to consider whether the scheme is efficient, etc., and is in public interest. If the answer is yes, complete exclusion follows. Therefore, when the Chief Secretary said that the Government had decided to nationalise road transport in Krishna District, he was certainly not saying that the Government was wedded to the scheme which was published and to which objections had been invited. The speech merely emphasises the aspect of complete exclusion; but it nowhere says that the scheme which was to bring about the exclusion into effect had already been approved. I may again in this connection refer to *Franklin's case*[1] where also an argument was raised that the Minister was biassed so far as any consideration of the draft order was concerned, as he had said in an earlier speech that he would make the said order. It was held that as the Minister had no judicial or quasi-judicial duty imposed on him, consideration of bias in the execution of this duty was irrelevant, the sole questions being whether or not he genuinely considered the report and the objections. In the present case also, the sole question was whether the objections to the scheme were genuinely considered. If after genuine consideration they were approved, complete exclusion would follow. Simply because the Chief Secretary said that the Government had decided to nationalise road transport in Krishna District, it did not follow that the Government was not prepared to consider fairly the objections to the scheme on the approval of which nationalisation would follow through complete exclusion. Considering, therefore, that the hearing before the State Government under section 68-D (2) was purely administrative, there is no force in this objection.

Re. (5). It is urged that the scheme was proposed by the Andhra Pradesh Road Transport Department as the State Transport Undertaking within the meaning of section 68-A and was approved while that undertaking was still in existence. But immediately after the scheme was approved the Undertaking came to an end and the Road Transport Corporation came into existence and that Corporation could not carry out the scheme which had been approved before it came into existence. The argument seems to be that the body which prepared the scheme and got it approved is the body which can enforce it, and as the Road Transport Corporation neither prepared it nor got it approved, it cannot enforce it. I am of opinion that there is no force in this contention. The Road Transport Corporation came into existence on the 11th of January, 1958. On the same date the State Government passed an order under section 34 of the Road Transport Corporation Act No. LIV of 1950 by which it directed that the Corporation shall take the management of the Road Transport Department of the Government of Andhra Pradesh and all assets and liabilities of the Department shall pass to the Corporation. The Staff of the Road Transport Department were given option to serve under the Corporation and direction was given that those who opt to serve the Corporation shall be employed

1. L.R. (1948) A.C. 87.

by the Corporation subject to the regulations made under the Act and the assurance given by the Government to the employees.

It was urged in the first place that such an order could not be passed under section 34 of the Road Transport Corporation Act. Section 34, however, gives very vide powers to the State Government to give directions to the Corporation, including directions relating to the recruitment, condition of service and training of its employees, wages to be paid to the employee, reserve to be maintained by it and disposal of its profits or stocks. In the circumstances, it was open to the State Government, under the wide powers conferred by section 34 of the Road Transport Corporation Act, to ask the Corporation which was being created to take over the assets, liabilities and the employees of the Road Transport Department which was being wound up. Now, the effect of this order was to make the Road Transport Corporation a successor of the Road Transport Department. It is true that there is nothing in Chapter IV-A of the Act which provides for succession of one kind of undertaking as defined in section 68-A (*b*) by another kind of undertaking as defined therein, but when in fact it happens that the Road Transport Corporation is ordered under section 34 of the Road Transport Corporation Act to take over everything from the Road Transport Department, there is no reason why it should not be considered to be the successor of the Road Transport Department which was at that time the State Transport Undertaking. If the Road Transport Corporation is thus a successor of the State Transport Undertaking from the 11th of January, 1958, I do not see why it cannot enforce the scheme which had already been approved at the instance of its predecessor. I can see no sense in requiring the Road Transport Corporation to go through all these steps which had been gone through by its predecessor, except that it would delay the coming into force of the scheme; probably, the argument has been raised merely for the sake of delay. But I am of opinion that the Road Transport Corporation in this case being the successor of the State Transport Undertaking which got the Scheme prepared and approved is entitled to enforce it under section 68-F of Chapter IV-A in the absence of any provision to the contrary in the Chapter. This contention also fails.

In view of what I have said above on the second contention, the petition fails and I would dismiss it with costs.

Sinha, J.—I have had the advantage of perusing the judgments prepared by our brothers, Subba Rao and Wanchoo, JJ. After giving my best consideration to the opinion expressed in the two judgments, I have come to the conclusion that I am not in a position to agree with all the conclusions arrived at by our brother Subba Rao.

Two main controversies were raised on behalf of the petitioners, namely, (1) that the provisions of Chapter IV-A of the Motor Vehicles Act, 1939 (which will be referred to in the course of this judgment as the Act), violate the fundamental rights guaranteed to citizens of India under the Constitution, and (2) that the scheme framed under the Act, was *ultra vires* the Act. I agree with my brother Subba Rao that the said Chapter IV-A of the Act does not infringe any fundamental rights of the petitioners, and that those provisions are constitutionally valid. I also agree with him in holding that the Road Transport Department of the Andhra Pradesh Government, is a State Transport Undertaking under the Central Act; that the Notification publishing the scheme had been validly done, and that the conditions precedent to the initiation of the scheme, had been fulfilled. But I do not agree with him in his conclusion that the State Government, in approving the published scheme was discharging any judicial or quasi-judicial function. On the other hand, I agree with my brother Wanchoo in his conclusion that in so doing, the State Government was only performing its normal administrative function.

As my learned brothers aforesaid have stated the relevant facts in detail, it is not necessary for me to repeat them, but as I differ from my learned brother Subba Rao, with whom some of my colleagues on the Constitution Bench have agreed, and for whose opinions, I have the greatest respect, I should state my reasons for differing from them and for agreeing with our brother Wanchoo. It may be taken as the

settled view of this Court that the question whether a certain decision envisaged in a statute, is judicial or quasi-judicial or only administrative in character, must depend upon the terms of the statute law itself, apart from any pre-conceived notions about the functions of a Court or other Tribunals vested with the duty and jurisdiction to decide controversies as a judicial body, vide *Province of Bombay* v. *Kusaldas S. Advani and others*[1], *Nagendra Nath Bora* v. *Commissioner of Hills Division* [2], and *Express Newspapers Limited* v. *Union of India*[3]. Now, let us see what has been envisaged by the impugned provisions of Chapter IV-A of the Act. The first step in the process is the preparation of a scheme of road transport service by a State Transport Undertaking "for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport service." Such a scheme may be to the exclusion, complete or partial, of other persons or otherwise. The second step would be to publish such a scheme in the Official Gazette and also in such other manner as the State Government may direct, giving particulars of the nature of the service proposed to be rendered, area or route proposed to be covered and other prescribed particulars—(section 68-C). The third step in that process is the filing of objections to the scheme by any person affected by the scheme so published. Those objections have to be filed before the State Government within thirty days from the date of the publication of the scheme—(section 68-D (1)). The fourth step is to be taken by the State Government, of considering the objections after giving an opportunity to the objectors or their representatives and the representatives of the State Transport Undertaking, to be heard—(section 68-D (2)). And the last step is that after hearing all concerned, the State Government may approve or modify the scheme. It is noteworthy that this section does not contemplate an outright rejection of the scheme but only a modification, if it is necessary. The scheme as approved or modified, has then to be published in the Official Gazette, and thereupon, the scheme becomes final. Such a scheme is called the "approved scheme", and the area or route to which it relates, is called the "notified area" or "notified route" —(section 68-D (3)). The approved scheme may at any time be cancelled, or modified by the State Transport Undertaking, according to the procedure already indicated, as contained in section 68-C and section 68-D, if it is proposed to modify it—(section 68-E). The provisions of Chapter IV, relating to the grant of stage carriage permits, etc., have been abrogated so as to make it obligatory on the Regional Transport Authority to issue permit applied for by a State Transport Undertaking, in pursuance of the approved scheme. Not only that, with a view to giving effect to the approved scheme in respect of a notified area or notified route, the Regional Transport Authority has been authorized to refuse renewal of any permit, to cancel any existing permit, or to modify the terms of any existing permit—(section 68-F). The provisions of section 64, relating to appeals by aggrieved persons against orders of refusal to grant a permit, or of revocation or suspension of a permit, or of refusal to renew a permit, etc., have been abrogated in so far as those orders have been passed under section 68-F.

A review of the provisions aforesaid, contained in sections 68-C to 68-F in Chapter IV-A, leads to the following conclusions :—

(1) A State Transport Undertaking has been authorized to determine whether or not it is in the public interest that road transport services in general, or any particular class of service, should be run and operated by the State Undertaking, in relation to any area or route or a portion thereof, keeping in view the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport service. It is for the State Transport Undertaking to prepare a scheme in furtherance of its determination in favour of such a service and to publish the same in the Official Gazette and elsewhere, with a view to informing the public, including those who may be affected by such a scheme.

(2) Objections to such a scheme may be taken by parties interested, but such objections are not *claims*.

(3) The State Government is authorized to decide the question whether the proposed scheme should be approved or modified, after hearing the parties or their representatives in support of their objections to the scheme. As the objections have to be directed to the merits of the scheme proposed by the State Transport Undertaking, there is no question of any *lis* between conflicting claims.

1. (1950) 2 M.L.J. 703 : (1950) S.C.J. 451 : 1950 S.C.R. 621..
2. (1958) S.C.J. 798 : A.I.R. 1958 S.C. 398.
3. (1958) S. C. J. 1113 : A.I.R. 1958 S.C. 578.

(4) No particular person or body of persons in the Governmental hierarchy of officers, has been designated as the Authority to hear the objections and to pronounce upon them, unlike the provisions in Chapter IV. Neither the provisions in Chapter IV-A nor the rules made in pursuance of section 68-I, contemplate adducing evidence or calling witnesses in support of or in opposition to the proposed scheme.

(5) The right of appeal as contemplated by section 64 in Chapter IV, has been expressly abrogated by section 68-F (3). Nor is there any provision in Chapter IV-A, requiring reasons to be given in writing for an order passed by a Regional Transport Authority under section 68-F (1) and (2), as contrasted with section 57 (7) in Chapter IV, which requires the Authority to give its reasons in writing for refusing an application for a permit of any kind, because such an order is open to appeal, revision or review.

The question now arises whether, in view of the provisions of Chapter IV-A, summarized above, and the conclusions as indicated above, the determination by the State Government is judicial or quasi-judicial in character, as contended for the petitioners, or only of an administrative character, as contended on behalf of the respondents. In order that a determination may be characterized as judicial or quasi-judicial, it is essential that it should be *objective*, based on evidence *pro* and *con* (not necessarily given in accordance with the strict rules of evidence) by a determinate authority who should not have the right to delegate such a function of a judicial character. Section 68-D (2) authorizes the State Government to decide whether or not the proposed scheme should be approved or modified. The "State Government" may mean the Governor himself or any of his Ministers or Deputy Ministers or any officers in the Secretariat, according to the rules of business promulgated under Article 166 of the Constitution. Section 68-D (2) could not have meant that the Governor himself or any of his Ministers should personally hear the objections—that would be throwing too great a burden on them. The objections may be heard by any one who has been delegated that power. If that is correct, the function to be performed under section 68-D (2), does not satisfy the test of judicial hearing. Under that section, the objections may be heard by '*A*' and the decision arrived at by '*B*'. If that is a regular procedure under that section, that is not an index of a judicial process.

Another very important consideration pointing to the conclusion that the determination under section 68-D (2) is not of a judicial character (using it in the comprehensive sense, including 'quasi-judicial', which expression has not been approved by high judicial authorities), is that no objective tests have been laid down in Chapter IV-A with reference to which, the determination has to be arrived at. The expression "efficient", "adequate", "economical", "properly co-ordinated" and "public interest ", are matters of opinion and policy, as section 68-C itself indicates, and do not lay down any objective tests. If I am right in that conclusion, there cannot be any question of evidence forthcoming in proof of something which is subjective to the authority determining that matter.

A very fundamental consideration in this connection, is whether sections 68-C and 68-D contemplate any *lis*. In other words, what is the proper scope and ambit of the inquiry envisaged by those sections ? The seheme prepared and published in accordance with section 68-C, by a State Transport Undertaking, is placed before the public only after the undertaking has reached the conclusion that it is necessary in the public interest. After the scheme has been prepared and published as aforesaid, the objections to be filed under section 68-D have reference to the basic question whether or not the scheme as published, was in public interest. Such objections are open to any person or organisation, *e.g.*, an Automobile Association, and are not limited only to persons who are providing road transport services. In my opinion, it is a mistake to suppose that the objections contemplated by section 68-D (1), could be on grounds personal to the objectors who are engaged in the business of providing road transport services. It is not open to any particular individual carrying on the business of providing road transport services, to claim that his route should be excluded from the operation of the published scheme. I am led to that conclusion by the effective words of section 68-D (1), namely, " file objections thereto ", that is, to the scheme published under section 68-C. The objections have to be limited to the merits of the scheme as propounded by the State Transport Undertaking. It will,

therefore, be opening the gates too wide to hold hat the objections have reference to particular routes or portions of routes covered by private transport services. The underlying purpose of inviting objections, is not to invite "claims" by individual businessmen engaged in providing road transport services, but to bring out useful information bearing on the feasibility and soundness of the scheme, as propounded by the undertaking. Once, the Government has decided upon a policy of nationalization of road transport facilities, the question of safeguarding the interest of individual businessmen in that line, is no more relevant. What is relevant for the purpose of the inquiry by the Government, on receipt of objections, is whether the published scheme is in the interest of the public. In my opinion, therefore, it is erroneous to suppose that the object of section 68-D (1) is to afford any remedy to a private individual in his personal interest. Particulars of the scheme required to be published under section 68-C, are meant for the information of the public, so that persons feeling interested in a public venture like that, may offer intelligent and constructive criticism with reference to the merits of the scheme. It is equally erroneous to suppose that there are two parties—one, represented by the undertaking, and the other, represented by persons who are engaged in the business of providing road transport services—and that the Government is the third party, which is the arbitrator between the two contesting parties. That, in my opinion, is not a correct reading of the provisions of Chapter IV-A of the Act. The whole aim and object of that Chapter is to replace individual businessmen engaged in that trade, by nationalised road transport services which are meant to be run in the interest of the community as a whole, and thus to serve the best public interest. The Government is as much interested in the scheme as the Road Transport Undertaking which is a creature and a limb of the Government, brought into existence with a view to implementing the policy of the Government to provide nationalised road transport services. That being the whole scheme of the policy of nationalisation, it is not correct to represent the StateTransport Undertaking as entering into competition with other individuals or incorporated bodies whose business it is to provide the same kind of transport facilities. That is made clear by the provisions of section 68-F, which, as indicated above, make it obligatory on the Regional Transport Authority to issue permits as applied for by the State Transport Undertaking. It follows from the foregoing observations that there is no question of the Government functioning as an adjudicating authority as between the rival claims of the undertaking and private persons engaged in the same kind of activity, or that the Secretary to Government in the Department of Road Transport, when he personally heard the objections, was functioning as a Judge, or that he was disqualified, by any bias, from hearing those objections. If we carry this line of reasoning to its logical conclusion, then even the Minister in charge of the Department, may be said to be equally interested, and therefore, equally bias ed, and thus, disqualified from hearing those objections and coming to his own determination, as contemplated in section 68-D (2). In my opinion, the concept that a person should not be a Judge in his own cause, is wholly foreign to the scheme and provisions of Chapter IV-A of the Act.

The scheme as prepared and published, may have proposed, as it did in the instant case, completely to exclude other persons from providing road transport service in the notified area by the notified routes. But the S ate Government is not concerned with determining whether any or some or all of the objectors could be permitted to provide or continue to provide their own road transport service. The State Government under section 68-D (2) has only to decide whether or not the proposed scheme should be approved or modified in any way. The decision to be arrived at by the State Government, is confined to the scheme, and is not concerned with rival claims by persons providing road transport service in the same area or by the same routes. That, in my opinion, is the reason why under that section, the State Government has not been authorized altogether to cancel the scheme, but only to approve or modify it. The State Government has to examine the soundness of the declaration made by the Road Transport Undertaking that the proposed scheme is in public interest. The stage of cancellation comes, if at all, later under section 68-E, when experience gained in working the approved scheme, may lead the State Trans-

port Undertaking to the conclusion that it should be cancelled or modified. But at the initial stage, that is to say, under section 68-D, the proposed scheme is already there only to be approved or modified in the light of the objections raised, if any- It has been held and it may be taken as well-settled that when there is a competition between a number of applicants for a particular route for supplying road transport service, the Regional Transport Authority or any other Authority deciding between those conflicting claims, has to determine the matter in a quasi-judicial way, because they are determining questions affecting the rights of individuals. But in the proceed. ing before the State Government, no such rival claims have to be decided upon. What has to be determined is whether the proposed scheme will serve public interest. Thus, in proceedings under Chapter IV of the Act, individual claims have to be decided upon, whereas under Chapter IV-A, it is the collective interest of the community as a whole, which is the subject-matter of determinaion by the State Government. In other words, the proposed scheme is the outcome of the decision by a limb of the State Government (State Transport Undertaking), which has come to the conclusion that it is in the public interest that road transport service should be run and operated by the State. The calling of objections by persons affected by the scheme, is not with a view to deciding between the rival claims of the State Undertaking and individuals providing road transport services in the areas or routes proposed to be covered. The State Transport Undertaking has not made any claim at this stage. Such a claim arises after the determination by the State Government under section 68-D (2). That stage is reached when the State Transport Undertaking applies for permits under section 68-F. Such a claim for a permit, once made by the undertaking, is no more a rival claim to be treated along with the claims of other individuals providing such road transport services, but an absolute claim which under that section shall be granted by the Regional Transport Authority which is authorized even to cancel an existing permit or modify the terms of an existing permit, or to refuse renewal of prmits, with a view to implementing the approved scheme. In my opinion, therefore, it is not correct to view the proceedings under Chapter IV-A before the State Government as a *lis* between any rival claims, unlike proceedings under Chapter IV of the Act. In view of these considerations, I would hold that there is no *lis* between rival claims, no determinate tribunal to determine any *lis*, and no procedure prescribed in Chapter IV-A approximating or even simulating judicial procedure. That being so, there is no question of any bias, because there can be none in a determination which is come to by officers of the Government in the discharge of their administrative duties.

As already indicated, the question now under consideration, does not admit of a general answer. The answer must depend upon the relevant statutory provisions, and one case decided on its own basic statutory provisions, cannot be a controlling authority for another ; but, by way of illustration, reported cases dealing with similar questions have been referred to. My learned brother Wanchoo, J., has referred in detail to *Franklin's case*[1], hence, I need not add any observations with reference to that case. But another case, namely, *Robinson* v. *Minister of Town and Country Planning*[2], perhaps, not referred to at the Bar, seems to me to be instructive in so far as it has discussed this very question with reference to the provisions of section 1 (1) of the Town and Country Planning Act, 1944, which is in these terms :

'Where the Minister of Town and Country Planning (in this Act referred to as 'the Minister') is satisfied that it is requisite, for the purpose of dealing satisfactorily with extensive war damage in the area of a local planning authority, that a part or parts of their area, consisting of land shown to his satisfaction to have sustained war damage or of such land together with other land contiguous or adjacent thereto, should be laid out afresh and redeveloped as a whole, an order declaring all or any of the land in such a part of their area to be land subject to compulsory purchase for dealing with war damage may be made by the Minister if an applications in that behalf is made to him by the authority before the expiration of five years from such date as the Minister may by order appoint as being the date when the making of such applications has become practicable. A part of the area of a local planning authority as to which the Minister is satisfied as aforesaid is in this Act referred to as an area of extensive war damage'."

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1. L.R. (1948) A.C. 87.
2. (1947) 1 All E.R. 851, 853, 854.

Lord Greene, M.R., who delivered the leading judgment of the Court of Appeal, reversing that of Henn Collins, J., thus summarized the procedure laid down in the Act:

"The procedural provisions in connection with the obtaining of an order under the sub-section may, so far as relevant, be summarised as follows: (*a*) Under sub-section (4) at least two months before the application is made the authority must publish a notice in a local newspaper; (*b*) under sub-section (5) the application must 'designate' the land to which the application relates by reference to a map with or without descriptive matter; (*c*) under sub-section (6) the application must be accompanied by a statement illustrated by a map, 'for indicating the manner in which it is intended that the land in the area of extensive war damage should be laid out as respects its internal arrangement and in relation to the existing or intended lay-out of the surrounding locality, and the manner in which it is intended that such land should be used whether for purposes requiring the carrying out of development or otherwie'; (*d*) under sub-section (7) if the Minister is satisfied that these particulars are adequate for enabling the 'expediency of the making of an order' to be properly considered, he notifies the authority who must then advertise for objections; (*e*) under Schedule I unless the Minister, apart from an objection (which must be accompanied by a written statement of its grounds) decides to refuse the application or to make an agreed modification to meet the objection, he must 'consider the grounds of the objection as set out in the statement' and may call for a further statement. Under paragraph 4 of the schedule the Minister, 'if satisfied that he is sufficiently informed, for the purpose of his deciding as aforesaid (*i.e.*, whether or not to make the order applied for) as to the matters to which the objection relates' he may decide to make the order without further investigation. Subject to this, the Minister (paragrah 5) must give the objector an opportunity of appearing before a person nominated by the Minister and, if the objector avails himself of this, a similar opportunity to the authority. Under paragraph 6, if it appears to the Minister that the matters to which the objection relates call for investigation by a public inquiry, he must cause such an inquiry to be held, in which case, the requirements of paragraph 5 as to a private hearing need not be complied with; (*f*) under section 1 (8), subject to the provisions of Schedule I, the Minister may make the order with or without modification, except that he cannot extend the area unless all persons interested consent."

In the case of *Phoenix Assurance Co., Ltd.* v. *Minister of Town and Country Planning*[1], Henn Collins, J., considered the nature of the order to be passed under section 1 (1) of the Town and Country Planning Act, 1944, and came to the conclusion that the Minister's function was of a quasi-judicial character. He followed that decision in the case which came up before the Court of Appeal in *Robinson* v. *Minister of Town and Country Planning*[2]. The Court of Appeal reversed the decision of the learned Judge, and did not approve of his decision in *Phoenix Assurance Co., Ltd.* v. *Minister of Town and Country Planning*[1]. In the course of his judgment, Lord Greene, M.R., observed as follows at page 859:

"It is the case of an original order to be made by the Minister as an executive authority who is at liberty to base his opinion on whatever material he thinks fit, whether obtained in the ordinary course of his executive functions or derived from what is brought out at a public inquiry if there is one. To say that, in coming to his decision, he is in any sense acting in a quasi-judicial capacity is to misunderstand the nature of the process altogether. I am not concerned to dispute that the inquiry itself must be conducted on what may be described as quasi-judicial principles, but this is quite a different thing from saying that any such principles are applicable to the doing of the executive act itself, *i.e.*, the making of the order. The inquiry is only a step in the process which leads to that result, and there is, in my opinion, no justification for saying that the executive decision to make the order can be controlled by the Courts by reference to the evidence or lack of evidence at the inquiry which is here relied on. Such a theory treats the executive act as though it were a judicial decision (or, if the phrase is preferred, a quasi-judicial decision) which it most emphatically is not."

I have devoted considerable space to the decision of the Court of Appeal[2], to show the close resemblance between the procedure envisaged in the Act of the British Parliament, and the law as laid down in Chapter IV-A of the Act. In the reported case also, there had to be an inquiry if objections were raised to the notified scheme of town planning, and the Minister concerned had to consider all the evidence led on behalf of the objectors. In that case, unlike the instant case, there was a provision for receiving evidence *pro* and *con*, but even then, the Court of Appeal did not hold that the function of the Minister was of a judicial or quasi-judicial character chiefly on the ground that no objective tests were possible in coming to his conclusions before passing the order under the relevant section of the Act of Parliament.

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1. (1947) 1 All E.R. 454.

2. (1947) 1 All E.R. 851, 853, 854.

For the reasons given above, I have come to the conclusion, in agreement with my brother Wanchoo, J., that the Government or the Minister concerned, when passing an order under section 68-D (2), had not to discharge a quasi-judicial function, but was acting only in its or his administrative capacity. It follows from this conclusion that all considerations flowing from the basic idea of the proceedings before the State Government being of a quasi-judicial character, are wholly out of the way. It must, therefore, be held that the order of the State Government, impugned in this case, is not open to any interference by the Courts. I would, therefore, dismiss the petition with costs.

ORDER.—In view of the opinion of the majority the order approving the scheme is hereby quashed and a direction issued to the first respondent to forbear from taking over any of the routes in which the petitioners are engaged in transport business. This will not preclude the State Government from making the necessary enquiry in regard to the objections filed by the petitioners in accordance with law. The petitioners will have liberty to file additional objections, if any. The parties to bear their own costs.

Order approving scheme quashed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—B. P. SINHA, J.L. KAPUR AND M. HIDAYATULLAH, JJ.

Messrs. R.C. Mitter & Sons, Calcutta and another .. *Appellants**

v.

The Commissioner of Income-tax, West Bengal, Calcutta .. *Respondent.*

Income-tax Act (XI of 1922), *section* 26-A *and rules* 2 *to* 6 *of Income-tax Rules* (*prior to* 1952)—" *Constituted under an instrument of partnership* "—*Scope and effect of—Registration of firm under—Conditions requisite.*

The word ' constituted ' in section 26-A of the Income-tax Act in its wider significance would include both the idea of creating or establishing a partnership and that of giving a legal form to the contract of partnership.

The words ' constituted under an instrument of partnership ' cannot be held to mean ' created or brought into existence by an Instrument of Partnership '. It is more in consonance with the relevant provisions of the Act to hold that those words include not only the firms created by an instrument of partnership but also those which may have been created by word of month but have been clothed in legal form by reducing the terms and conditions into writing.

R. C. Mitter & Sons v. *C.I.T.*, (1955) 28 I.T.R. 698 (704, 705), disapproved.

Dwarakadas Khetan & Co. v. *C.I.T., Bombay City, Bombay,* (1956) 29 I.T.R. 903 at 907, approved.

Per *Sinha and Kapur, JJ.*—For a proper construction of the relevant provisions of the Act relating to registration of firms sections 26, 26-A and 28 and the rules 2 to 6 of the Income-tax Rules framed under section 59 have to be read together. So read it is clear that the following essential conditions must be fulfilled in order that a firm may be held entitled to registration.

1. The firm should be constituted under an instrument of partnership specifying the individual shares of the partners ;

2. An application on behalf of, and signed by, all the partners, containing all the particulars as set out in the rules should have been made ;

3. The application should have been made before the assessment of the income of the firm, made, under section 23 of the Act, for that particular year ;

4. The profits (or loss, if any) of the business relating to previous year—the relevant accounting year, should have been divided or credited, as the case may be, in accordance with the terms of the Instrument ; and lastly

5. The partnership must have been genuine, and must actually have existed in conformity with the terms and conditions of the Instrument.

In other words the terms of partnership should appear in the Instrument of Partnership in respect of the relevant accounting year and the firm should have been in existence during the accounting year as shown in that instrument.

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* C. As. Nos. 85 and 389 of 1957. 15th April, 1959.

Per *Hidayatullah, J.*—I agree that it is not possible to read for the expression " constituted under " in section 26-A the words " constituted by " ; but whether the instrument sought to be registered should be in existence in the accounting year before registration could be claimed is doubtful. There is nothing in the Act which says this specifically. While I entertain some doubts I am not prepared to dissent.

In the instant cases, the partnerships did not admittedly function *under* the deed of partnership in the accounting year and the Department and the High Court were right in refusing registration in respect of the following assessment year.

Appeal from the Judgment and Order, dated the 26th August, 1955, of the Calcutta High Court in Income-tax References Nos. 44 of 1954 and 17 of 1953.

S. Mitra, Senior Advocate, (*P. K. Mukherjee*, Advocate, with him), for Appellant in C.A. No. 85 of 1957.

N. C. Chatterjee, Senior Advocate, (*P. K. Ghosh, Advocate*, with him) for Appellant in C.A. No. 389 of 1957.

R. Ganapathy Iyer, R. H. Dhebar and D. Gupta, Advocates, for Respondent.

The Court delivered the following Judgments :—

Sinha, J. (On behalf of himself and *Kapur, J.*).—The common question of law arising in these two appeals on certificates of fitness granted by the High Court of Calcutta under section 66-A (2) of the Indian Income-tax Act, 1922, is the effect and scope of the words "constituted under an instrument of partnership" in section 26-A of the Income-tax Act, which, in the course of this judgment, will be referred to as the Act.

The facts of the two cases, leading up to these appeals, though not dissimilar, are not identical. They are, therefore, set out separately.

In Civil Appeal No. 85 of 1957, Messrs. R.C. Mitter & Sons, 54, Rani Kanto Bose Street, Calcutta, claim to be a firm said to have been constituted in April, 1948, with four persons whose names and shares in the nett profits of the partnership business, are stated to be as under :

(*a*) Ramesh Chandra Mitter—40 per cent. of the nett profits.

(*b*) Sudhir Chandra Mitter—30 per cent. of the nett profits.

(*c*) Sukumar Mitter—20 per cent. of the nett profits.

(*d*) Sushil Chandra Mitter—10 per cent. of the nett profits.

The firm intimated its bank, the Bengal Central Bank, Ltd., (as it then was), of the constitution of the firm as set out above, by its letter dated April 15, 1948. The letter also stated that a partnership deed was going to be drawn up and executed by the partners aforesaid, and that the deed so drawn up, will be forwarded to the bank in due course. Though the firm is said to have come into existence in April, 1948, the deed of partnership which is set out as Annexure " A " at page 5 of the paper book, was drawn up only on September 27, 1949. This deed of partnership appears to have been registered under the provisions of the Indian Partnership Act, on October 12, 1949. It was also forwarded to the Bengal Central Bank, Ltd., Head Office at Calcutta, as it appears from the seal of the bank and the signature dated December 7, 1949. An application to register the firm under section 26-A, for the assessment year 1949-50, was made to the Income-tax Authorities. The date of the said application does not appear from the record before us. The application was rejected by the Income-tax Authorities. The firm preferred an appeal to the Income-tax Appellate Tribunal, which was also dismissed by the Tribunal by its order dated September 7, 1953. The ground of the order of the Tribunal was that as the firm admittedly was formed by a verbal agreement in April, 1948, and not by or under an instrument in writing dated September 27, 1949, and as the assessment was for the year 1949-50, for which registration of the firm was sought, the registration could not be ordered. The Tribunal also referred to the letter aforesaid to the Bengal Central Bank, and observed that the letter merely contained information as to the formation of the partnership and of the personnel thereof, but it did not contain the terms on which the partnership had been formed. It also showed

that a partnership had been created but not by deed. Hence, the Tribunal further observed, the letter might be useful for consideration on the question of the genuineness of the firm, but it could not fulfil the requirements of section 26-A, namely, that the firm should be constituted under an instrument of partnership. Therefore, the Tribunal held that assuming the firm to be genuine, it was not entitled to be registered under section 26-A of the Act. Thereupon, the assessee moved the Tribunal under section 66 (1) of the Act. That application was granted by the order dated February, 2, 1954, and the case stated to the High Court for its decision on the following question :—

"Whether the assessee firm which is alleged to have come into existence by a verbal agreement in April, 1948, is entitled to be registered under section 26-A for the purpose of assessment for 1949-50 where the Instrument of Partnership was drawn up only in September, 1949, after the expiry of the relevant previous year."

The High Court Bench, presided over by Chakravarthi, C.J., by its judgment dated August 26, 1955, answered the question in the negative. The learned Chief Justice considered the matter from all possible view points, including grammatical, etymological and textual matters, and came to the conclusion that " constituted " meant " created ". He also considered that the preposition " under " is " obviously inappropriate ", after having convinced himself that " constituted " could be equated with " created ". He also found no difficulty in observing that " some of the paragraphs of the Form appear to be ill-adjusted to the provisions of the Act and the Rules ". In the end, therefore, he concluded with the remarks :

" It appears to me to be desirable that the language of the section, as also that of the Rules should receive legislative attention."

In Civil Appeal No. 389 of 1957, Messrs. D. C. Auddy and Brothers, Calcutta, claim to be a partnership consisting of Dulal Chand Auddy, Prem Chand Auddy, Gora Chand Auddy and Kalipada Nandy. The partnership business is said to have begun in June, 1944. An application was made on August 24, 1949, for the registration of the partnership. The Income-tax Officer and the Appellate Assistant Commissioner were of the opinion that the partnership was not a genuine one, and could not be registered. Another reason for not ordering registration was that the partnership deed, having been executed on June 2, 1948, could not be operative during the two years under consideration, namely, 1945-46 and 1946-47. On appeal, the Income-tax Appellate Tribunal rested its decision on the finding that the alleged partnership had not been constituted under an instrument of partnership within the meaning of those words in section 26-A of the Act. At the instance of the assessee, the Tribunal framed the following question for determination by the High Court :—

" Whether the assessee firm constituted orally in June, 1944, can validly be registered in the assessment years 1945-46 and 1946-47 under section 26-A of the Indian Income-tax Act on the basis of a memorandum of Partnership executed in June, 1948."

The other parts of the statement of the case by the Tribunal, refer to the merits of the assessment, with which we are not concerned in this appeal. Hence, it is not necessary to set out those facts. On this part of the statement of the case, the High Court gave the same answer as in the other appeal. In this case also, the High Court granted the necessary certificate under section 66-A (2), read with Article 135 of the Constitution. As both the cases raise the same question of law, they have been heard together, and will be governed by this judgment.

It is convenient at this stage to set out the relevant provisions of the Act. Section 26-A is in these terms :—

" 26-A. *Procedure in registration of firms*.—(1) Application may be made to the Income-tax Officer on behalf of any firm, constituted under an instrument of partnership specifying the individual shares of the partners, for registration for the purposes of this Act and of any other enactment for the time being in force relating to income-tax or super-tax.

(2) The application shall be made by such person or persons and at such times and shall contain such particulars and shall be in such form, and be verified in such manner, as may be prescribed and it shall be dealt with by the Income-tax Officer in such manner as may be prescribed."

The section contemplates the framing of rules laying down the details of the form in which the application has to be made and the particulars which should be stated in the application, and other cognate matters. Section 59 of the Act, authorizes the Central Board of Revenue, subject to the control of the Central Government, to make rules for carrying out the purposes of the Act, and sub-section (5) of section 59 provides that rules made under the section, shall be published in the Official Gazette, and " shall thereupon have effect as if enacted in this Act ". Income-tax Rules 2 to 6-B lay down the details of the procedure for making an application for the registration of a firm, as contemplated under section 26-A, quoted above. These rules have been amended extensively in 1952, but we are concerned in this case with the rules before those amendments. Rule 2 requires such an application to be signed by all the partners personally, and to be made before the income of the firm is assessed for the year, under section 23 of the Act. Rule 3 requires that the application be made in the Form annexed to the rule, and that the application " shall be accompanied by the original Instrument of Partnership under which the firm is constituted." The Form appearing in rule 3, requires the assessment year to be specified. Thus, the registration is for a particular year of assessment, and not for future years also, and therefore, the application for registration has to be made every year, which in fact means an application for renewal of the registration. Paragraph 3 of the Form requires a certificate to be signed by the applicants for registration, to the effect that the profits (or loss, if any) of the previous year were divided or credited as shown in section B of the Schedule. The Form contains the Schedule in 7 columns which require the names of the partners, their addresses, the date of admittance to partnership, their shares in the profits or loss, etc., to be filled in. Under the Schedule, there are Section A and Section B. Section A has to contain particulars of the firm as constituted at the date of the application, and Section B has to contain the particulars of the apportionment of the income, profits or gains (or loss) of the business in the previous year between the partners who in that previous year were entitled to share therein. Rule 4 provides that if the Income-tax Officer is satisfied that there is or was a firm in existence constituted as shown in the instrument of partnership, and that the application has been properly made, he has to enter a certificate at the foot of the Instrument of Partnership that the firm has been registered under section 26-A of the Act, and that the certificate of registration shall have effect for the assessment for the year specified therein. Rule 5 is as follows :—

" 5. The certificate of registration granted under Rule 4 shall have effect only for the assessment to be made for the year mentioned therein."

And Rule 6 makes provision for the certificate of registration to be renewed for a subsequent year, on an application being made in that behalf in accordance with the preceding Rules.

It is manifest that for a true and proper construction of the relevant provisions of the Act, relating to registration of firms, sections 26, 26-A and 28, and the Rules summarized above, have to be read together. So read, it is reasonably clear that the following essential conditions must be fulfilled in order that a firm may be held entitled to registration :—

(1) That the firm should be constituted under an Instrument of Partnership, specifying the individual shares of the partners;

(2) That an application on behalf of, and signed by, all the partners containing all the particulars as set out in the Rules, has been made ;

(3) That the application has been made before the assessment of the income of the firm, made under section 23 of the Act (omitting the words not necessary for our present purpose), for that particular year ;

(4) That the profits (or loss, if any) of the business relating to the previous year, that is to say, the relevant accounting year, should have been divided or credited, as the case may be, in accordance with the terms of the Instrument; and lastly,

(5) That the partnership must have been genuine, and must actually have existed in conformity with the terms and conditions of the Instrument.

It is clear from what has been said above with reference to the relevant provisions of the Act, that the certificate of registration has reference to a particular assessment year, and has effect for the assessment to be made for that particular year. In other words, the terms of the partnership should appear in the Instrument of Partnership in respect of the relevant accounting year. It is equally clear that the firm to be registered, should have been in existence during the accounting year, " constituted as shown in the Instrument of Partnership ". The Rules, thus, contemplate a document operative during the accounting year. We are not here concerned with the further question whether the document should be in existence at the very inception of the accounting year, or before the year is out.

The provisions of the Act, set out above, do not present any serious difficulty except for the words " constituted under an Instrument of Partnership " occurring in section 26-A and the relevant Rules. On the interpretation of these words there has been a conflict of judicial opinion, as will presently appear. On behalf of the assessee-appellants, it has been contended that so long as the assessment has not been made, the assessees are entitled to have their firms registered in accordance with the terms of the Instrument of Partnership, irrespective of the year in which the Instrument may have come into existence. Strong reliance was placed upon the decision of the Bombay High Court (Chagla, C.J., and Tendolkar, J.,) in the case of *Dwarkadas Khetan & Co.* v. *Commissioner of Income-tax, Bombay City, Bombay*[1] wherein, the following observations have been made :—

" Any firm can make an application under section 26-A for registration and the two conditions that it has got to comply with are that it must be constituted under an instrument of partnership and the second condition is that the instrument of partnership must specify the individual shares of the partners. If these two conditions are satisfied it would be entitled to registration. The section does not say that the firm must be constituted by the instrument of partnership. It does not require that the firm must come into existence by reason of the instrument of partnership, or that the firm should be the creature of the instrument of partnership, or that the firm must not exist prior to the instrument of partnership being executed."

In the case decided by the Bombay High Court, the Instrument of Partnership had been executed on March 27, 1946, with effect from January 1, 1946. On an application made to the Department to register the firm, the matter was determined by the Income-tax Appellate Tribunal against the assessee on the ground that the partnership was in existence before the deed was executed, and that therefore, it could not be registered. Before the Bombay High Court, reliance had been placed on behalf of the Department on the decision of the Calcutta High Court, now before us in appeal, as also on a decision of the Punjab High Court. The decision of the Calcutta High Court now under examination, in the case of *R. C. Mitter & Sons* v. *Commissioner of Income-tax*[2], takes the view that section 26-A of the Act contemplates a firm created or brought into existence *by* an Instrument of Partnership, which governs the distribution of shares in the relevant accounting period. Such a deed should have come into existence on or before the commencement of the relevant accounting period. The other decision relied upon in the Bombay High Court, had been given by a Division Bench of the Punjab High Court, reported in *Padam Parshad Rattan Chand* v. *Commissioner of Income-tax, Delhi*[3].

On the other hand, it has been contended on behalf of the Revenue that in order to entitle a firm to be registered, the firm should have been created by an Instrument of Partnership, or at any rate, such an Instrument should be in existence during the relevant accounting year, that is, the year previous to the year of assessment in respect of which the application for registration has been made. For the first part of the submission on behalf of the respondent, there is ample authority in the decision under appeal, which had been relied upon before the Bombay High Court. In that

1. (1956) 29 I.T.R. 903, 907.
2. (1955) 28 I.T.R. 698.
3. (1954) 25 I.T.R. 335.

case, (*R. C. Mitter & Sons* v. *Commissioner of Income-tax*[1]), Chakravarthi, C.J., who delivered the opinion of the Court under section 66 (1) of the Act, after a very elaborate discussion, came to the conclusion which may best be expressed in his own words, as follows :—

> " If by the expression ' constituted under an instrument of partnership ' is meant a firm which originated in a verbal agreement but with respect to which a formal deed was subsequently executed, there would be no room in the section for partnerships actually created by an instrument and such partnerships, although most obviously entitled to registration, would be excluded from the purview of the section. Even etymologically or textually, I do not think that the word ' constituted ', when used in relation to a firm or such other body, can mean anything but ' created ' when the reference is to some deed or instrument to which the inception of the firm or other body is to be traced."

After having, thus, held that section 26-A contemplated firms created or brought into existence by a deed in writing, he had no difficulty in substituting " by " for "under", thus, making the crucial words "constituted by" instead of "constituted under ". In our opinion, the learned Chief Justice fell into the error of re-constructing the provisions of the statute, instead of construing them. The word "by" could be substituted for the word " under " in section 26-A only if the words, as they stand in the section, were not capable of making sense, and it would, thus have been necessary to amend the wording of the section. Turning his attention from the wording of the section to that of the Rules and the Form appearing under the Rules, he again came to the conclusion that " some of the paragraphs of the Form appear to be ill-adjusted to the provisions of the Act ". Referring to other parts of the Rules, he was constrained to observe that they " would lend strong support to the view that what is meant by ' any firm constituted under an instrument of partnership' in section 26-A is no more than a firm of which the constitution appears from an instrument in writing. It is obvious that if such be the meaning of the expression ' constituted under an instrument of partnership ', the instrument need not be one by which the partnership was created ". But then he attempted to get over that difficulty by observing that the language of the Rules and the Form could not supersede a provision contained in the Act itself. He further opined that the language in paragraph 4 (1) is " undoubtedly unsatisfactory ". In our opinion, any attempt to re-construct the provisions of the relevant section and the Rules, on the assumption that the intention of the legislature was to limit the registration of firms to only those which have been created *by* an Instrument of Partnership, is, with all respect, erroneous. The proper way to construe the provisions of the statute is to give full effect to all the words of the relevant provisions, to try to read them harmoniously, and then to give them a sensible meaning. Hence, we have to consider, at the threshold, the question whether the words " constituted under an Instrument of Partnership" have some meaning which can be attributed to them harmoniously with the rest of the relevant provisions. A partnership may be created or set up by a contract in writing, setting out all the terms and conditions of the partnership, but there may be many cases, and perhaps such cases are more numerous than the other class, where a partnership has been brought into existence by an oral agreement between the parties on certain terms and conditions which may subsequently be reduced to writing which will answer the description of an Instrument of Partnership. Such an instrument would, naturally, record all the terms and conditions of the contract between the parties which, at the initial stages, had not been reduced to writing. In such a case, though the partnership had been brought into existence by an oral agreement amongst the partners, if the terms and conditions of the partnership have been reduced to the form of a document, it would be right to say that the partnership has been constituted under that instrument. The word " constituted " does not necessarily mean "created" or "set up", though it may mean that also. It also includes the idea of clothing the agreement in a legal form. In the Oxford English Dictionary, Vol. II, at pages 875 and 876, the word " constitute " is said to mean, *inter alia*, "to set up, establish, found (an institution, etc.)" and also "to give legal or official form or shape to (an assembly, etc.)" Thus, the word in its wider significance would include both, the idea of creating or establishing, and the idea of giving a

1. (1955) 28 I.T.R, 698.

legal form to, a partnership. The Bench of the Calcutta High Court in the case of *R. C. Mitter & Sons* v. *Commissioner of Income-tax*[1] under examination now, was not, therefore, right in restricting the word " constitute " to mean only " to create " when clearly it could also mean putting a thing in a legal shape. The Bombay High Court, therefore, in the case of *Dwarkadas Khetan & Co.* v. *Commissioner of Income-tax, Bombay City, Bombay*[2], was right in holding that the section could not be restricted in its application only to a firm which had been created by an instrument of partnership, and that it could reasonably and in conformity with commercial practice, be held to apply to a firm which may have come into existence earlier by an oral agreement, but the terms and conditions of the partnership have subsequently been reduced to the form of a document. If we construe the word " constitute " in the larger sense, as indicated above, the difficulty in which the learned Chief Justice of the Calcutta High Court found himself, would be obviated inasmuch as the section would take in cases both of firms coming into existence by virtue of written documents as also those which may have initially come into existence by oral agreements, but which had subsequently been constituted under written deeds. The purpose of the provision of the Income-tax Act—section 26-A—is not to compel the firms which had been brought into existence by oral agreements, to dissolve themselves and to go through the formality of constituting themselves by Instruments of Partnership. If we construe the words " constituted under " in that wider sense, we give effect to the intention of the legislature of compelling a firm which had existed as a result of an oral agreement, to enter into a document defining the terms and conditions of the partnership, so as to bind the partners to those terms, before they could get the benefit of the provisions of section 23 (5) (*a*). Section 23 (5) (*a*) confers a privilege upon partners who may find it more worth their while to be assessed upon their individual total income than upon the total income of the partnership. It is, therefore, very important from the point of view of the Revenue that the Department should be apprised in time of the true constitution of the partnership, the names of the true partners and the precise share of each of them in the partnership profits (or loss, if any). The very object of this provision will be defeated if the alleged partnership is not genuine, or if the true constitution of the partnership and the respective shares of the partners, are not fully and correctly placed on record as soon as possible, for the purpose of assessment. In this connection, the provisions of section 28 (2) of the Act, are also worth noticing. That sub-section provides that if the Income-tax Officer or the Appellate Authorities under the Act, are satisfied that the profits of a registered firm have been distributed otherwise than in accordance with the shares of the partners, as shown in the Instrument of Partnership registered under the Act, and governing such distribution, and that any partner has concealed any part of his profits, the penalty prescribed therein may be imposed upon such a partner. Unless the Instrument of Partnership has been registered in respect of the accounting year and before the assessment has been done, the penal provisions aforesaid cannot be enforced. It is, therefore, essential, in the interest of proper administration and enforcement of the relevant provisions relating to the registration of firms, that the firms should strictly comply with the requirements of the law, and it is incumbent upon the Income-tax Authorities to insist upon full compliance with the requirements of the law. But, in our opinion, there is no warrant in the words of the relevant provisions of the statute for restricting registration under section 26-A of the Act to those firms only which have been created or brought into existence *by* an Instrument of Partnership. In our opinion, it is more in consonance with the terms of the relevant provisions of the Act, referred to above, to hold that the words "constituted under an instrument of partnership" include not only firms which have been created by an Instrument of Partnership but also those which may have been created by word of mouth but have been subsequently clothed in legal form by reducing the terms and conditions of the partnership to writing.

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1. (1955) 28 I.T.R. 698. 2. (1956) 29 I.T.R. 903.

We have already indicated that there has been a conflict of judicial opinion in the different High Courts in India on the question now before us. But on a consideration of the facts in each case, it will be found that the decision arrived at in most of the cases, was correct, though the reasons given appear to have gone beyond the requirements of the case. The decision of the Bombay High Court in *Dwarkadas Khetan & Co.* v. *Commissioner of Income-tax, Bombay City, Bombay*[1], discloses that the partnership then in question had come into existence with effect from the beginning of 1946, though the Instrument of Partnership was executed on March 27, 1946. Thus, the instrument of partnership came into existence during the accounting year, whatever that year may have been, because the year 1946 was the starting year of the partnership. Hence, even the earliest assessment year, presumably the year 1947-48, would be governed by the terms and conditions of the written Instrument of Partnership aforesaid. The decision of the Bombay High Court was followed by the same Bench of that Court in the case of *Commissioner of Income-tax, Bombay North* v. *Shantilal Vrajal and Chandulal Dayalal & Co.*[2]. In the second case, the learned Judges ruled that the second partnership deed of September 12, 1951, which set out the names and shares of all the partners, who constituted the partnership, could be registered in respect of the accounting year November, 1948 to October, 1949. This conclusion was arrived at without even a mention, far less a discussion, of the relevant provisions of the Act. Apparently, the matter was not critically placed before the learned Judges, when they decided the second case. The conclusion in this case is, with all respect, apparently wrong in view of our conclusion that the Instrument of Partnership should have been in existence in the accounting year.

In the High Court of Punjab, the question was fully discussed in a judgment of a Division Bench, given by one of us (Kapur, J., as he then was), in the case of *Kalsi Mechanical Works, Nandpur* v. *Commissioner of Income-tax, Simla*[3]. In that case, the firm had come into existence by a verbal agreement in June, 1944. The deed of partnership was drawn up as late as May 9, 1949. The application for registration of the firm under section 26-A for the assessment year 1949-50, was dismissed by the Income-tax Authorities as also by the Tribunal. The High Court, after an elaborate examination of the relevant provisions of the Act, including the Rules and the Forms, upheld the orders of the Department. The conclusion of the Bench was in these terms :—

> "The sections of the Income-tax Act show that for the purpose of registration it is necessary that the firm should be constituted by an instrument of partnership and in my opinion the Rules read with sections 26 and 28 of the Act indicate that such a firm as is constituted under an instrument of partnership should have been in existence during the account period and should not come into existence during the assessment year, and if it was not in existence during the account period it cannot be registered so as to affect the liabilities of the partners for income-tax accruing during the account period."

The conclusion reached is correct, except, with all respect, for the observation that under section 26-A, it is necessary that the firm should be constituted "by" an instrument of partnership. That is the leading judgment in the High Court of Punjab. It was followed by another Division Bench of that Court in the case of *Padam Parshad Rattan Chand* v. *Commissioner of Income-tax, Delhi*[4], to the effect that "constituted under an instrument" in section 26-A meant "created or formed by a formal deed". In this case, the business of the firm had started from April 1, 1947, but the Instrument of Partnership was executed on April 10, 1950. The application for registration was made in respect of the assessment year 1948-49. It is clear with reference to these dates that the Instrument of Partnership was not in existence either during the accounting year or even during the assessment year, and the Court, therefore, rightly held that the partnership could not be registered in respect of the assessment year; but they proceeded further to observe that there was no objection to the firm being treated as having been constituted under the Instrument as from

1. (1956) 29 I.T.R. 903.
2. (1957) 31 I.T.R. 903.
3. (1953) 24 I.T.R. 353, 361.
4. (1954) 25 I.T.R. 335.

the date of the Instrument itself. The answer of the Court to the question posed, was that the firm could be registered not in respect of the assessment year for which the application had been made, but with effect from the date of the Instrument. Apparently, the attention of the Court was not drawn to the Rules aforesaid, particularly, Rules 2 and 3, which require that the application has to be made before the assessment is completed and for a particular assessment year. More or less to the same effect, are two other Division Bench rulings of that High Court in *Bery Engineering Co., Delhi* v. *Commissioner of Income-tax, Delhi*[1], and *Income-tax Commissioner, Delhi* v. *Messrs. Birdhi Chand Girdhari Lal*[2]. In all these cases in the Punjab High Court, the deeds came into existence later than the accounting year or the assessment year, and therefore, could not have been registered. The actual decisions in these cases were correct, though there are *obiter dicta* to the effect that section 26-A requires that the firm should have been created or set up by an Instrument of Partnership.

In the Patna High Court, the very same question was discussed at great length by a Division Bench of that Court, presided over by Ramaswami, C.J., in the case of *Khimji Walji & Co.* v. *Commissioner of Income-tax, Bihar and Orissa*[3]. The learned Chief Justice, after an elaborate examination of the relevant provisions of the Act, came to the conclusion in these terms :—

> " It is necessary for the purpose of registration under section 26-A that the partnership should be constituted by an instrument of partnership and that such a partnership as is constituted under an Instrument of Partnership should have been in existence during the accounting year."

It is on the same lines as the leading judgment of the Punjab High Court.[4] With reference to the dates given in the judgment, the decision is right, though, in this case also, the words " constituted under " have been construed as " constituted by ", without discussing the necessity for so amending the words of the statute, even as in the Punjab High Court decisions.

As a result of the above discussion, the conclusion is reasonably clear that unless the partnership business was carried on in accordance with the terms of an Instrument of Partnership which was operative during the accounting year, it cannot be registered in respect of the following assessment year. As in these cases, the partnership did not admittedly function under such a deed of partnership, the Department and the High Court were right in refusing registration.. We would, therefore, dismiss these appeals but for different reasons to those given below. The respondent is entitled to his costs one set of hearing fees to be paid half and half by the appellants.

Hidayatullah, J.—I have had the advantage of reading the judgment just delivered by my brother, Sinha, J. I agree that section 26-A of the Indian Income-tax Act must be read as it is. The words of the section, as they stand, are not meanningless, and in view of the decision in *Commissioners for Special Purposes of the Income-tax* v. *Pemsel*[5], it is not possible to read for the expression " constituted under " the words " constituted by ".

I entertain, however, some doubt as to whether the instrument sought to be registered, should be in existence in the accounting year, before registration can be claimed. There is nothing in the Act which says this specifically. My brother has reasoned from the contents of the Act and the Rules that such a condition is implied. While I entertain some doubts, I am not prepared to record a dissent, more so as the Board of Revenue has issued instructions that all firms should be registered, whether the document under which they were constituted existed in the accounting year or not, provided the Income-tax Officer was satisfied about the genuineness of the firms.

In the result, I agree that the appeals should be dismissed with costs.

Appeals dismissed.

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1. (1955) 28 I.T.R. 227.
2. (1955) 28 I.T.R. 280.
3. (1954) 25 I.T.R. 462, 470.
4. (1953) 24 I.T.R. 353.
5. L.R. (1891) A.C. 351, 542.

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, S. J. IMAM, J. L. KAPUR, A. K. SARKAR, K. SUBBA RAO AND M. HIDAYATULLAH, JJ.

Tahsildar Singh and another .. *Appellants**

v.

The State of U. P. .. *Respondent.*

Criminal Procedure Code (V of 1898), section 162—Scope and object—Right of accused as regards statements made by witness to police during investigation—Limits.

The object of the Legislature throughout has been to exclude the statement of a witness made before the police during the investigation from being made use of at the trial for any purpose and the amendments made from time to time were only intended to make clear the said object and to dispel the cloud cast on such intention. The Criminal Procedure Code of 1898 for the first time introduced the said statement reduced to writing to be used for impeaching the credit of the witness in the manner provided by the Evidence Act. As the phraseology of the exception lent scope to defeat the purpose of the Legislature, by the Amending Act of 1923, the section was re-drafted defining the limits of the exception with precision so as to confine it only to contradict the witness in the manner provided under section 145 of the Evidence Act. Both section 162 of the Criminal Procedure Code and the Proviso intended to serve primarily the same purpose, *i.e.*, the interest of the accused.

The Proviso to section 162 of the Code of Criminal Procedure only enables the accused to make use of such statement to contradict a witness in the manner provided by section 145 of the Evidence Act. It would be doing injustice to the language of the Proviso if the said statement be allowed to be used for the purpose of cross-examining a witness within the meaning of the first part of section 145 of the Evidence Act. The word "cross-examination" in the last line of the first Proviso to section 162 of the Code of Criminal Procedure cannot be understood to mean the entire gamut of cross-examination without reference to the limited scope of Proviso, but should be confined only to be cross-examination by contradiction allowed by the said Proviso. (1) A statement in writing made by a witness before a Police Officer in the course of investigation can be used only to contradict his statement in the witness-box and for no other purpose : (2) Statements not reduced to writing by the Police Officer cannot be used for contradiction ; (3) Though a particular statement is not expressly recorded, a statement that can be deemed to be part of that expressly recorded can be used for contradictions not because it is an omission strictly so called but because it is deemed to form part of the recorded statement ; (4) Such a fiction is permissible by construction only in the following three cases; (i) when a recital is necessarily implied from the recital or recitals found in the statement : (ii) a negative aspect of a positive recital in a statement and (iii) when the statement before the Police and before the Court cannot stand together. It is for the trial Judge to decide in each case, after comparing the part or parts of the statement recorded by the Police with that made in the witness-box, to give a ruling having regard to the aforesaid principles whether the recital intended to be used for contradiction satisfies the requirements of law.

Per *S. J. Imam and M. Hidayatullah, JJ.*—Relevant and material omissions in the statement to the Police amount to vital contradictions which can be established by cross-examination and confronting the witness with his previous statement. The words "to contradict him" appearing in section 145 of the Evidence Act must carry the same meaning as the words "to contradict such witness" in section 162 of the Code. If section 162 of the Code is construed to narrowly the right it confers will cease to be any real protection to the accused and be an impediment to effective cross-examination.

Appeal by Special Leave from the Judgment and Order dated the 11th September, 1957, of the Allahabad High Court in Criminal Appeal No. 1388 of 1956 and Referred Trial No. 133 of 1956, arising out of the Judgment and Order dated the 8th September, 1956, of the Court of the Additional Sessions Judge at Etawah in Sessions Trial Nos. 83 and 109 of 1955.

Jai Gopal Sethi, Senior Advocate, (*R. L. Kohli*, Advocate, with him), for Appellants.

S. P. Sinha, Senior Advocate, (*G. C. Mathur* and *G. N. Dikshit*, Advocates, with him), for Respondent.

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* Criminal Appeal No. 67 of 1958. 5th May, 1959.

The Court delivered the following Judgments :

Subba Rao, J. (on behalf of himself *B. P. Sinha, J. L. Kapur* and *A. K. Sarkar, JJ.*)—This appeal by Special Leave raises the question of construction of section 162, Code of Criminal Procedure. On June 16, 1954, one Ram Sanehi Mallah of Nayapura gave a dinner at his home and a large number of his friends attended it. After the dinner, at about 9 P.M., a music performance was given in front of the house of Ram Sanehi's neighbour, Ram Sarup. About 35 or 40 guests assembled in front of Ram Sarup's platform to hear the music. The prosecution case is that a large number of persons armed with fire-arms suddenly appeared near a well situated on the southern side of the house of Ram Sarup and opened fire which resulted in the death of Natthi, Bharat Singh and Saktu, and injuries to six persons, namely, Nasari, Bankey, Khem Singh, Bal Kishen, Misaji Lal and Nathu.

The topography of the locality where the incident took place is given in the two site-plans, Exhibit B-57 and Exhibit P-128. It appears from the plans that the house of Ram Sarup faces west, and directly in front of the main door of his house is a platform ; to the south-west of the platform, about 25 paces away, is a well with a platform of 3 feet in height and about 13 feet in width around it ; and to the west of the platform in front of Ram Sarup's house the audience were seated.

The prosecution version of the sequence of events that took place on that fatal night is as follows. After the dinner, there was a music performance in front of the platform of Ram Sarup's house and a number of persons assembled there to hear the music. Saktu played on the Majeera while Nathu was singing. It was a full-moon night and there were also a gas lamp and several lanterns. Bankey and Asa Ram placed their guns on a cot close to the platform and Bharat Singh was sitting on that cot. While Bankey was among the audience, Asa Ram was still taking his dinner inside the house. At about 9 P.M., the accused along with 15 or 20 persons arrived from an eastern lane, stood behind the well, shouted that no one should run away and advanced northward from the well firing shots. Natthi and Saktu were hit and both of them died on the spot. Bharat Singh, who was also hit, ran northward and was pursued by some of the culprits and was shot dead in front of Bankey's house shown in the plan. Bankey, who was also shot at and injured, took up Asa Ram's gun and went up to the roof of Ram Sarup's house wherefrom he fired shots at the dacoits, who were retreating. Asa Ram, who was luckily inside the house taking his dinner, ran up to the roof of Ram Sarup's house and saw the occurrence from over the parapet. The culprits turned over the dead-bodies of Saktu, Natthi and Bharat Singh and, on seeing Bharat Singh's face, they exclaimed that Asa Ram was killed. Thereafter, they proceeded northward, passed through the corner of Ram Sarup's house and disappeared in the direction of the Chambal. They also carried away Bankey's gun which was on the cot.

The motive for the offence is stated thus : The culprits were members of a notorious gang called the Man Singh's gang, who, it is alleged, were responsible for many murders and dacoities in and about the aforesaid locality. That gang was in league with another gang known as Charna's gang operating in the same region. Asa Ran and Bankey had acted as informers against Charna's gang, and this information led to the killing of Charna. Man Singh's gang wanted to take vengeance on the said two persons ; and, having got the information that the said two persons would be at the music party on that fateful night, they organised the raid with a view to do away with Asa Ram and Bankey.

Out of the nine accused committed to the Sessions, the learned Session Judge acquitted seven, convicted Tahsildar Singh and Shyama Mallah under 14 charges and awarded them various sentences, including the sentence of death. Before the learned Session Judge, Tahsildar Singh took a palpably false plea that he was not Tahsildar Singh but was Bhanwar Singh, and much of the time of the learned Sessions Judge was taken to examine the case of the prosecution that the accused was really Tahsildar Singh, son of Man Singh. The other accused, Shyama Mallah, though made a statement before the Sub-Divisional Magistrate admitting some-

facts, which were only exculpatory in nature, denied the commission of the offence before the committing Magistrate and before the learned Session Judge. As many as eight eye-witnesses described the events in detail and clearly stated that both the accused took part in the incident. When one of the witness, Bankey (P.W. 30), was in the witness-box, the learned counsel for the accused put to him the following two questions in cross-examination :

1. "Did you state to the investigating officer that the gang rolled the dead bodies of Natthi, Saktu and Bharat Singh, and scrutinise them and did you tell him that the face of Asa Ram resembled that of the deceased Bharat Singh ?"

2. "Did you state to the investigating officer about the presence of the gas lantern?"

In regard to the first question, the learned Sessions Judge made the following note :

"The cross-examining counsel was asked to show the law which entitles him to put this question. He is unable to show any law. I, therefore, do not permit the question to be put unless I am satisfied."

In respect of the second question, the following note is made :

"He is also unable to show any law entitling him to put this question. I will permit him to put it if he satisfies me about it."

It appears from the deposition that no other question on the basis of the statement made before the police was put to this witness. After his evidence was closed, the learned Judge delivered a considered order giving his reasons for disallowing the said two questions. The relevant part of the order reads :

"Therefore if there is no contradiction between his evidence in Court and his recorded statement in the diary, the latter cannot be used at all. If a witness deposes in Court that a certain fact existed but had stated under section 161, Criminal Procedure Code, either that that fact had not existed or that the reverse and irreconcilable fact had existed, it is a case of conflict between the deposition in the Court and the statement under section 161, Criminal Procedure Code and the latter can be used the contradict the former. But if he had not stated under section 161 anything about the fact, there is no conflict and the statement cannot be used to contradict him. In some cases an omission in the statement under section 161 may amount to contradiction of the deposition in Court ; they are the cases where what is actually stated is irreconcilable with what is omitted and impliedly negatives its existence."

It is enough to notice at this stage that the learned Sessions Judge did not by the said order rule that no omission in the statement made under section 161 of the Code of Criminal Procedure can be put to a witness, but stated that only an omission which is irreconcilable with what is stated in evidence can be put to a witness. The said two omissions were not put to any of the other witnesses except to one to whom only one of the said omissions was put. No other omissions were put in the cross-examination either to P.W. 30 or to any other witness. The learned Sessions Judge on a consideration of the voluminous evidence in the case held that the guilt was brought home to the said two accused and convicted them as aforesaid. Tahsildar Singh and Shyama Mallah preferred two separate appeals to the High Court against their convictions and sentences. The two appeals were heard along with the reference made by the learned Sessions Judge under section 374 of the Code of Criminal Procedure for the confirmation of the sentence of death awarded to the appellants. The learned Judges of the High Court, after reviewing the entire evidence over again, accepted the findings of the learned Sessions Judge and confirmed the convictions and sentences passed on the appellants. Before the High Court a petition was filed by the appellants alleging that the learned Sessions Judge did not allow the counsel for defence to put omissions amounting to material contradictions to the eye-witnesses and therefore the said eye-witnesses should be summoned so that the said questions might be put to them. That petition was filed on 1st May, 1957, and on 30th July, 1957, after the argument in the appeal was closed, the petition was dismissed. Presumably, no attempt was made to press this application either before the appeals were taken up for argument or during the course of the argument ; but the question raised in the petition was considered by the learned Judges of the High Court in their judgment. The judgment discloses

that the learned counsel appearing for the appellants argued before the High Court that the learned Sessions Judge wrongly disallowed the aforesaid two questions, and the learned Judges, conceding that those two questions should have been allowed, held that the accused were not prejudiced by the said fact. They justified their conclusion by the following reasons :

> " We did so because among other reasons we decided to ignore these two circumstances and to base our findings on matters of greater certainty, namely, the fact of the miscreants firing while advancing, passing in front of Ram Swarup's platform and taking away Bankey's gun from the cot, movements which brought them close to the eye-witnesses and thereby gave the witnesses an unmistakable opportunity of seeing their faces in the light of the lanterns and the full moon. These factors made recognition by witnesses independent of any gas lantern or any scrutiny of the dead bodies, so that these matters ceased to be of any real consequence and therefore made the summoning of the eye-witnesses before us quite unnecessary."

In the result, they dismissed the appeals. The present appeal is by Special Leave filed against the judgment of the High Court.

Learned counsel for the appellants raised before us the following points : (1) (*a*). Section 162 of the Code of Criminal Procedure by its own operation attracts the provisions of section 145 of the Evidence Act and under the latter section the whole vista of cross-examination on the basis of the previous statement in writing made by the witnesses before the police is open to the accused; to illustrate the contention : a witness can be asked whether he made a particular statement before the police officer ; if he says "yes", the said assertion can be contradicted by putting to him an earlier statement which does not contain such a statement. (1) (*b*). The word "contradiction" is of such wide connotation that it takes in all material omissions and a Court can decide whether there is one such omission as to amount to contradiction only after the question is put, answered and the relevant statement or part of it is marked, and, therefore, no attempt should be made to evolve a workable principle, but the question must be left at large to be decided by the Judge concerned on the facts of each case. (2). The High Court erred in holding that only two questions were intended to be put in cross-examination to the prosecution witnesses whereas the advocate for the accused intended to put to the witnesses many other omissions to establish that there was development in the prosecution case from time to time but refrained from doing so in obedience to the considered order made by the learned Sessions Judge. (3). Even if only two questions were illegally disallowed, as it was not possible to predicate the possible effect of the cross-examination of the witnesses on the basis of their answers to the said questions on their reliability, it should be held that the accused had no opportunity to have an effective cross-examination of the witnesses and therefore they had no fair trial. (4). The learned Judges committed an illegality in testing the credibility of the witnesses other than the witness who gave the first information report by the contents of the said report.

The arguments of the learned counsel for the respondent in respect of each of the said contentions will be considered in their appropriate places.

We shall proceed to consider the contentions of the learned counsel for the appellants in the order in which they were addressed :

Re. (1) (*a*) : Diverse and conflicting views were expressed by Courts on the interpretation of section 162 of the Code of Criminal Procedure. A historic retrospect of the section will be useful to appreciate its content. The earliest Code is that of 1872 and the latest amendment is that of 1955. Formerly Criminal Procedure Code for Courts in the Presidency towns and those in the mofussil were not the same. Criminal Procedure Code, 1882 (X of 1882) consolidated the earlier Acts and prescribed a uniform law to all Courts in India. It was superseded by Act V of 1898 and substantial changes were made by Act XVIII of 1923. Since then the Code stands amended from time to time by many other Acts. The latest amendments were made by Act XXVI of 1955 which received the assent of the President on 10th August, 1955, and by notification issued by the Central Government its provisions came into force on and from 1st January, 1956. We

are not concerned in this case with the Amending Act of 1955, but only with the Act as it stood before the amendment of 1955.

In Act X of 1872 the section corresponding to the present section 162 was section 119, which read :

> "An officer in charge of a Police-station, or other Police-officer making an investigation, may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and may reduce into writing any statement made by the person so examined.
>
> Such person shall be bound to answer all questions relating to such case, put to him by such officer, other than questions criminating himself.
>
> No statement so reduced into writing shall be signed by the person making it, nor shall it be treated as part of the record or used as evidence."

This section enables a Police-officer to elicit information from persons supposed to be acquainted with facts, and permits him to reduce into writing the answers given by such persons, but excludes the said statement from being treated as part of the record or used as evidence. Act X of 1882 divided the aforesaid section 119 into two sections and numbered them as sections 161 and 162, which read :

> *Section* 161.—"Any Police-officer making an investigation under this Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and may reduce into writing any statement made by the person so examined.
>
> Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture."
>
> *Section* 162.—"No statement, other than a dying declaration, made by any person to a Police-officer in the course of an investigation under this Chapter shall, if reduced to writing, be signed by the person making it, or be used as evidence against the accused.
>
> Nothing in this section shall be deemed to affect the provisions of section 27 of the Indian Evidence Act, 1872."

The first two paragraphs of section 119 of Act X of 1872 with slight modifications not relevant for the present purpose constituted the corresponding paragraphs of section 161 of Act X of 1882 ; and the third paragraph of section 119 of the former Act, with some changes, was made section 162 of the latter Act. There was not much difference between the third paragraph of section 119 of the Act of 1872 and section 162 of the Act of 1882, except that in the latter Act, it was made clear that the prohibition did not apply to a dying declaration or affect the provisions of section 27 of the Indian Evidence Act, 1872. The Code of 1898 did not make any change in section 161, nor did it introduce any substantial change in the body of section 162 except taking away the exception in regard to the dying declaration from it and putting it in the second clause of that section. But section 162 was amended by Act V of 1898 and the amended section read :

> "(1) No statement made by any person to a Police-officer in the course of an investigation under this Chapter shall, if taken down in writing, be signed by the person making it, nor shall such writing be used as evidence :
>
> Provided that, when any witness is called for the prosecution whose statement has been taken down in writing as aforesaid, the Court shall, on the request of the accused, refer to such writing, and may then, if the Court thinks it expedient in the interests of justice, direct that the accused be furnished with a copy thereof ; and such statement may be used to impeach the credit of such witness in manner provided by the Indian Evidence Act, 1872.
>
> (2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of section 32, clause (1), of the Indian Evidence Act, 1872."

For the first time the proviso to section 162 introduced new elements, namely : (i) The right of the accused to request the Court to refer to the statement of a witness reduced to writing ; (ii) a duty cast on the Court to refer to such writing; (iii) discretion conferred on the Court in the interests of justice to direct that the accused be furnished with a copy of the statement ; and (iv) demarcating the field within which such statements can be used, namely, to impeach the credit of the witness in the manner provided by the Indian Evidence Act, 1872. From the standpoint of the accused, this was an improvement on the corresponding sections of the earlier

Codes, for whereas the earlier Codes enacted a complete bar against the use of such statements in evidence, this Code enabled the accused, subject to the limitations mentioned therein, to make use of them to impeach the credit of a witness in the manner provided by the Indian Evidence Act. On the basis of the terms of section 162 of Act V of 1896, two rival contentions were raised before the Courts. It was argued for the prosecution that on the strength of section 157 of the Evidence Act, the right of the prosecution to prove any oral statement to contradict the testimony of any witness under that section was not taken away by section 162 of the Code of Criminal Procedure which only provided that the writing shall not be used as evidence. On the other hand, it was contended on behalf of the accused that when the statement of a witness was admittedly reduced into writing, it would be unreasonable to allow any oral evidence of the statement to be given when the writing containing the statement could not be proved. The judgment of Hosain, J., in the case of *Rustom* v. *King-Emperor*[1] and the decisions in *Fanindra Nath Banerjee* v. *Emperor*[2], *King-Emperor* v. *Nilakanta*[3] and *Muthukumaraswami Pillai* v. *King-Emperor*[4] represent one side of the question, and the judgment of Knox, J., in *Rustom* v. *King-Emperor*[1] and the observations of Beaman, J., in *Emperor* v. *Narayan*[5] represent the other side. A Division Bench of the Bombay High Court in *Emperor* v. *Hanmaraddi Bin Ramaraddi*[6], after noticing the aforesaid decisions on the question, ruled that the Police-officer could be allowed to depose to what the witness had stated to him in the investigation for the purpose of corroborating what the witness had said at the trial. In that context, Shah, J., observed at page 66 :

> " The point is not free from difficulty which is sufficiently reflected in the diversity of judicial opinions bearing on the question."

Presumably, in view of the aforesaid conflict, to make the legislative intention clear the section was amended by Act XVIII of 1923. Section 162 as amended by the aforesaid Act reads :

> " (1) No statement made by any person to a Police-officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police-diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:
>
> Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the Court shall, on the request of the accused, refer to such writing and direct that the accused be furnished with a copy, thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872. When any part of such statement is so, used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination:
>
> Provided, further that, if the Court is of opinion that any part of any such statement is not relevant to the subject-matter of the inquiry or trial or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests, it shall record such opinion (but not the reasons therefor) and shall exclude such part from the copy of the statement furnished to the accused."

Sub-section (1) of the substituted section attempted to steer clear of the aforesaid conflicts and avoid other difficulties by the following ways : (*a*) Prohibited the use of the statement, both oral and that reduced into writing, from being used for any purpose at any inquiry or trial in respect of any offence under investigation; (*b*) while the earlier section enabled the accused to make use of it to impeach the credit of a witness in the manner provided by the Indian Evidence Act, 1872, the new section enabled him only to use it to contradict the witness in the manner provided by section 145 of the said Act; (*c*) the said statement could also be used for the purpose of only explaining any matter referred to in his cross-examination; and (*d*) while under the old section a discretion was vested in the Court in the matter of furnishing the accused with a copy of an earlier statement of a prosecution

1. (1910) 7 A.L.J. 468.
2. (1908) I.L.R. 36 Cal. 281.
3. (1912) I.L.R. 35 Mad. 247 : 22 M.L.J. 490.
4. (1912) I.L.R. 35 Mad. 397.
5. (1907) I.L.R. 32 Bom. 111.
6. (1915) I.L.R. 39 Bom. 58.

witness, under the amended section, subject to the second proviso, a duty was cast upon the Court, if a request was made to it by the accused, to direct that the accused be furnished with a copy thereof. The effect of the amendment was that the loopholes which enabled the use of the statement made before the police in a trial were plugged and the only exception made was to enable the accused to use the statement of a witness reduced into writing for a limited purpose, namely, in the manner provided by section 145 of the Indian Evidence Act, 1872, and the prosecution only for explaining the matter referred to in his cross-examination. The scope of the limited use also was clarified. Under the old section the statement was permitted to be used to impeach the credit of a witness in the manner provided by the Indian Evidence Act ; under the said Act, the credit of a witness could be impeached either under section 145 or under section 155 (3). While the former section enables a witness to be cross-examined as to a previous statement made by him in writing without such writing being shown to him, the latter section permits the discrediting of the witness by proof of his previous statement by independent evidence. If a statement in writing could be used to discredit a witness in the manner provided by those two sections, the purpose of the Legislature would be defeated. Presumably in realisation of this unexpected consequence, the Legislature in the amendment made it clear that the said statement can only be used to contradict a witness in the manner provided by section 145 of the Evidence Act. By Act II of 1945, the following sub-section (3) was added to section 161 :

> "The Police-officer may reduce into writing any statement made to him in the course of an examination under this section, and if he does so, he shall make a separate record of the statement of each person whose statement he records."

This sub-section restored the practice obtaining before the year 1923 with a view to discourage the practice adopted by some of the Police-officers of taking a condensed version of the statements of all the witnesses or a precis of what each witness said. It is not necessary to notice in detail the changes made in section 162 by Act XXVI of 1955 except to point out that under the amendment the prosecution is also allowed to use the statement to contradict a witness with the permission of the Court and that in view of the shortened committal procedure prescribed, copies of the statements of the prosecution witnesses made before the police during investigation are made available by the police to the accused before the commencement of the inquiry or trial. The consideration of the provisions of the latest amending Act need not detain us, for the present case falls to be decided under the Act as it stood before that amendment.

It is therefore, seen that the object of the Legislature throughout has been to exclude the statement of a witness made before the police during the investigation from being made use of at the trial for any purpose, and the amendments made from time to time were only intended to make clear the said object and to dispel the cloud cast on such intention. The Act of 1898 for the first time introduced an exception enabling the said statement reduced to writing to be used for impeaching the credit of the witness in the manner provided by the Evidence Act. As the phraseology of the exception lent scope to defeat the purpose of the Legislature, by the Amendment Act of 1923, the section was redrafted defining the limits of the exception with precision so as to confine it only to contradict the witness in the manner provided under section 145 of the Evidence Act. If one could guess the intention of the Legislature in framing the section in the manner it did in 1923, it would be apparent that it was to protect the accused against the user of the statements of witnesses made before the police during investigation at the trial presumably on the assumption that the said statements were not made under circumstances inspiring confidence. Both the section and the proviso intended to serve primarily the same purpose, *i.e.*, the interest of the accused.

Braund, J., in *Emperor* v. *Aftab Mohd. Khan*[1] gave the purpose of section 162 thus at page 299 :

1. A.I.R. 1940 All. 291 (299).

"As it seems to us it is to protect accused persons from being prejudiced by statements made to Police-officers who by reason of the fact that an investigation is known to be on foot at the time the statement is made, may be in a position to influence the maker of it and, on the other hand, to protect accused persons from the prejudice at the hands of persons who in the knowledge that an investigation has already started, are prepared to tell untruths."

A Division Bench of the Nagpur High Court in *Baliram Tikaram Marathe* v. *Emperor*[1] expressed a similar idea in regard to the object underlying the section, at page 5, thus :

"The object of the section is to protect the accused both against over-zealous Police-officers and untruthful witnesses."

The Judicial Committee in *Pakala Narayana Swami* v. *The King-Emperor*[2] found another object underlying the section when they said at page 78 :

"If one had to guess at the intention of the Legislature in framing a section in the words used, one would suppose that they had in mind to encourage the free disclosure of information or to protect the person making the statement from a supposed unreliability of Police testimony as to alleged statements or both."

Section 162 with its proviso, if construed in the manner which we will indicate at the later stage of the judgment, clearly achieves the said objects.

The learned counsel's first argument is based upon the words "in the manner provided by section 145 of the Indian Evidence Act, 1872" found in section 162 of the Code of Criminal Procedure. Section 145 of the Evidence Act, it is said, empowers the accused to put all relevant questions to a witness before his attention is called to those parts of the writing with a view to contradict him. In support of this contention reliance is placed upon the judgment of this Court in *Bhagwan Singh* v. *The State of Punjab*[3]. Bose, J., describes the procedure to be followed to contradict a witness under section 145 of the Evidence Act thus at page 819 :

"Resort to section 145 would only be necessary if the witness *denies* that he made the former statement. In that event, it would be necessary to prove that he did, and if *the former statement was reduced to writing*, then section 145 requires that his attention must be drawn to these parts which are to be used for contradiction. But that position does not arise when the witness admits the former statement. In such a case all that is necessary is to look to the former statement of which no further proof is necessary because of the admission that it was made."

It is unnecessary to refer to other cases wherein a similar procedure is suggested for putting questions under section 145 of the Indian Evidence Act, for the said decision of this Court and similar decisions were not considering the procedure in a case where the statement in writing was intended to be used for contradiction under section 162 of the Code of Criminal Procedure. Section 145 of the Evidence Act is in two parts : the first part enables the accused to cross-examine a witness as to previous statement made by him in writing or reduced to writing without such writing being shown to him ; the second part deals with a situation where the cross-examination assumes the shape of contradiction : in other words, both parts deal with cross-examination ; the first part with cross-examination other than by way of contradiction, and the second with cross-examination by way of contradiction only. The procedure prescribed is that, if it is intended to contradict a witness by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. The proviso to section 162 of the Code of Criminal Procedure only enables the accused to make use of such statement to contradict a witness in the manner provided by section 145 of the Evidence Act. It would be doing violence to the language of the proviso if the said statement be allowed to be used for the purpose of cross-examining a witness within the meaning of the first part of section 145 of the Evidence Act. Nor are we impressed by the argument that it would not be possible to invoke the second part of section 145 of the Evidence Act without putting relevant questions under the first part thereof. The difficulty is more imaginary than real. The second part

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1. A.I.R. 1945 Nag. 1 (5).
2. (1939) L.R. 66 I.A. 66 (78) : (1939) 1 M.L.J. 756.
3. (1952) S.C.J. 284 : (1952) 1 M.L.J. 816: (1952) S.C.R. 812 (819).

of section 145 of the Evidence Act clearly indicates the simple procedure to be followed. To illustrate : *A* says in the witness-box that *B* stabbed *C*; before the police he had stated that *D* stabbed *C*. His attention can be drawn to that part of the statement made before the police which contradicts his statement in the witness-box. If he admits his previous statement, no further proof is necessary; if he does not admit, the practice generally followed is to admit it subject to proof by the Police-officer. On the other hand, the procedure suggested by the learned counsel may be illustrated thus : If the witness is asked "did you say before the Police-officer that you saw a gas-light?" and he answers "yes", then the statement which does not contain such recital is put to him as contradiction. This procedure involves two fallacies : one is, it enables the accused to elicit by a process of cross-examination what the witness stated before the Police-officer. If a Police-officer did not make a record of a witness' statement, his entire statement could not be used for any purpose, whereas if a Police-officer recorded a few sentences, by this process of cross-examination, the witnesses' oral statement could be brought on record. This procedure, therefore, contravenes the express provision of section 162 of the Code. The second fallacy is that by the illustration given by the learned counsel for the appellants there is no self-contradiction of the primary statement made in the witness-box, for the witness has yet not made on the stand any assertion at all which can serve as the basis. The contradiction, under the section, should be between what a witness asserted in the witness-box and what he stated before the Police-officer, and not between what he said he had stated before the Police-officer and what he actually made before him. In such a case the question could not be put at all : only questions to contradict can be put and the question here posed does not contradict; it leads to an answer which is contradicted by the police statement. This argument of the learned counsel based upon section 145 of the Evidence Act is, therefore, not of any relevance in considering the express provisions of section 162 of the Code of Criminal Procedure.

This leads us to the main question in the case, *i.e.*, the interpretation of section 162 of the Code of Criminal Procedure. The cardinal rule of construction of the provisions of a section with a proviso is succinctly stated in Maxwell's "Interpretation of Statutes," 10th edition., at page 162, thus:

"The proper course is to apply the broad general rule of construction, which is that a section or enactment must be construed as a whole, each portion throwing light if need be on the rest.

The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together is to prevail."

Unless the words are clear, the Court should not so construe the proviso as to attribute an intention to the Legislature to give with one hand and take away with another. To put it in other words, a sincere attempt should be made to reconcile the enacting clause and the proviso and to avoid repugnancy between the two.

As the words in the section declare the intention of the Legislature, we shall now proceed to construe the section giving the words used therein their natural and ordinary sense.

The object of the main section as the history of its legislation shows and the decided cases indicate is to impose a general bar against the use of statement made before the police and the enacting clause in clear terms says that no statement made by any person to a Police-officer or any record thereof, or any part of such statement or record, be used for any purpose. The words are clear and unambiguous. The proviso engrafts an exception on the general prohibition and that is, the said statement in writing may be used to contradict a witness in the manner provided by section 145 of the Evidence Act. We have already noticed from the history of the section that the enacting clause was mainly intended to protect the interests of accused. At the state of investigation, statements of witnesses are taken in a haphazard manner. The Police-officer in the course of his investigation finds himself more often in the midst of an excited crowd and babel of voices raised all round. In such an atmosphere, unlike that in a Court of Law, he is expected to hear the

statements of witnesses and record separately the statement of each one of them. Generally he records only a summary of the statements which appear to him to be relevant. These statements are, therefore, only a summary of what a witness says and very often perfunctory. Indeed, in view of the aforesaid facts, there is a statutory prohibition against Police-officers taking the signature of the person making the statement, indicating thereby that the statement is not intended to be binding on the witness or an assurance by him that it is a correct statement.

At the same time, it being the earliest record of the statement of a witness, soon after the incident, any contradiction found therein would be of immense help to an accused to discredit the testimony of a witness making the statement. The section was, therefore, conceived in an attempt to find a happy *via media*, namely, while it enacts an absolute bar against the statement made before a Police-officer being used for any purpose whatsoever, it enables the accused to rely upon it for a limited purpose of contradicting a witness in the manner provided by section 145 of the Evidence Act by drawing his attention to parts of the statement intended for contradiction. It cannot be used for corroboration of a prosecution or a defence witness or even a Court witness. Nor can it be used for contradicting a defence or a Court witness. Shortly stated, there is a general bar against its use subject to a limited exception in the interest of the accused, and the exception cannot obviously be used to cross the bar.

If the provisions of the section are construed in the aforesaid background, much of the difficulty raised disappears. Looking at the express words used in the section two sets of words stand out prominently which afford the key to the intention of the Legislature. They are: "statement in writing", and "to contradict". "Statement" in its dictionary meaning is the act of stating or reciting. *Prima facie* a statement cannot take in an omission. A statement cannot include that which is not stated. But very often to make a statement sensible or self-consistent, it becomes necessary to imply words which are not actually in the statement. Though something is not expressly stated, it is necessarily implied from what is directly or expressly stated. To illustrate: '*A*' made a statement previously that he saw '*B*' stabbing '*C*' to death; but before the Court he deposed that he saw '*B*' and '*D*' stabbing '*C*' to death: the Court can imply the word "only" after '*B*' in the statement before the police. Sometimes a positive statement may have a negative aspect and a negative one a positive aspect. Take an extreme example: if a witness states that a man is dark, it also means that he is not fair. Though the statement made describes positively the colour of a skin, it is implicit in that statement itself that it is not of any other colour. Further, there are occasions when we come across two statements made by the same person at different times and both of them cannot stand or co-exist. There is an inherent repugnancy between the two and, therefore, if one is true, the other must be false. On one occasion a person says that when he entered the room, he saw '*A*' shooting '*B*' dead with a gun; on another occasion the same person says that when he entered the room he saw '*C*' stabbing '*B*' dead: both the statements obviously cannot stand together, for, if the first statement is true, the second is false and *vice versa*. The doctrine of recital by necessary implication, the concept of the negative or the positive aspect of the same recital, and the principle of inherent repugnancy, may in one sense rest on omissions, but, by construction, the said omissions must be deemed to be part of the statement in writing. Such omissions are not really omissions strictly so called and the statement must be deemed to contain them by implication. A statement, therefore, in our view, not only includes what is expressly stated therein, but also what is necessarily implied therefrom.

"Contradict" according to the Oxford Dictionary means to affirm to the contrary. Section 145 of the Evidence Act indicates the manner in which contradiction is brought out. The cross-examining counsel shall put the part or parts of the statement which affirms the contrary to what is stated in evidence. This indicates that there is something in writing which can be set against another statement made in evidence. If the statement before the Police-officer—in the sense we have indicated—and the statement in the evidence before the Court are so inconsistent

or irreconcilable with each other that both of them cannot co-exist, it may be said that one contradicts the other.

It is broadly contended that a statement includes all omissions which are material and are such as a witness is expected to say in the normal course. This contention ignores the intention of the legislature expressed in section 162 of the Code and the nature of the non-evidentiary value of such a statement, except for the limited purpose of contradiction. Unrecorded statement is completely excluded. But recorded one is used for a specified purpose. The record of a statement, however perfunctory, is assumed to give a sufficient guarantee to the correctess of the statement made, but if words not recorded are brought in by some fiction, the object of the section would be defeated. By that process, if a part of a statement is recorded, what was not stated could go in on the sly in the name of contradiction, whereas if the entire statement was not recorded, it would be excluded. By doing so, we would be circumventing the section by ignoring the only safeguard imposed by the legislature, *viz.*, that the statement should have been recorded.

We have already pointed out that under the amending Act of 1955, the prosecution is also allowed to use the statement to contradict a witness with the permission of the Court. If construction of the section as suggested by the learned counsel for the appellants be accepted, the prosecution would be able to bring out in the cross-examination facts stated by a witness before a Police-officer but not recorded and facts omitted to be stated by him before the said officer. This result is not decisive on the question of construction, but indicates the unexpected repercussions of the argument advanced to the prejudice of the accused.

As section 162 of the Code of Criminal Procedure enables the prosecution in the re-examination to rely upon any part of the statement used by the defence to contradict a witness, it is contended that the construction of the section accepted by us would lead to an anomaly, namely, that the accused cannot ask the witness a single question, which does not amount to contradiction whereas the prosecution, taking advantage of a single contradiction relied upon by the accused, can re-examine the witness in regard to any matter referred to in his cross-examination, whether it amounts to a contradiction or not. I do not think there is any anomaly in the situation. Section 145 of the Evidence Act deals with cross-examination in respect of a previous statement made by the witness. One of the modes of cross-examination is by contradicting the witness by referring him to those parts of the writing which are inconsistent with his present evidence. Section 162, while confining the right to the accused to cross-examine the witness in the said manner, enables the prosecution to re-examine the witness to explain the matters referred to in the cross-examination. This enables the prosecution to explain the alleged contradiction by pointing out that if a part of the statement used to contradict be read in the context of any other part, it would give a different meaning ; and if so read, it would explain away the alleged contradiction. We think that the word " cross-examination " in the last line of the first proviso to section 162 of the Code of Criminal Procedure cannot be understood to mean the entire gamut of cross-examination without reference to the limited scope of the proviso, but should be confined only to the cross-examination by contradiction allowed by the said proviso.

The conflict of judicial opinion on this question is reflected in the decisions of different High Courts in this country. One of the views is tersely put by Burn, J., in In re *Ponnusami Chetty*[1], at page 476 :

> " Whether it is considered as a question of logic or language, " omission " and " contradiction " can never be identical. If a proposition is stated, any contradictory proposition must be a statement of some kind, whether positive or negative. To " contradict " means to "speak against" or in one word to " gainsay ". It is absurd to say that you can contradict by keeping silence. Silence may be full of significance, but it is not " diction ", and therefore it cannot be " contradiction ".

Considering the provisions of section 145 of the Evidence Act, the learned Judge observed thus, at page 477 :

1. (1933) 64 M.L.J. 519 : I.L.R. 56 Mad. 475 (476).

"It would be in my opinion sheer misuse of words to say that you are contradicting a witness by the writing, when what you really want to do is to contradict him by pointing out omissions from the writing. I find myself in complete agreement with the learned Sessions Judge of Ferozepore who observed that 'a witness cannot be confronted with the unwritten record of an unmade statement.' "

The learned Judge gives an illustration of a case of apparent omission which really is a contradiction, *i.e.*, a case where a witness stated under section 162 of the Code that he saw three persons beating a man and later stated in Court that four persons were beating the same man. This illustration indicates the trend of the Judge's mind that he was prepared to treat an omission of that kind as part of the statement by necessary implication. A Division Bench of the Madras High Court followed this judgment in In re *Guruva Vannan*[1]. In that judgment, Mockett, J., made the following observation, at page 901 :

"I respectfully agree with the judgment of Burn, J., in *Ponnuswamy Chetty* v. *Emperor*[2] in which the learned Judge held that a statement under section 162 of the Code of Criminal Procedure cannot be filed in order to show that a witness is making statements in the witness-box which he did not make to the police and that bare omission cannot be a contradiction. The learned Judge points out that, whilst a bare omission can never be a contradiction, a *so-called* omission in a statement may sometimes amount to a contradiction for example, when to the police three persons are stated to have been the criminals and later at the trial four are mentioned."

The Allahabad High Court in *Ram Bali* v. *State*[3] expressed the principle with its underlying reasons thus, at page 294 :

"Witness after witness was cross-examined about certain statements made by him in the deposition but not to be found in his statement under section 162, Criminal Procedure Code. A statement recorded by the police under section 162 can be used for one purpose and one purpose only and that of contradicting the witness. Therefore if there is no contradiction between his evidence in Court and his recorded statement in the diary, the latter cannot be used at all. If a witness deposes in Court that a certain fact existed but had stated under section 162 either that that fact had not existed or that the reverse and irreconcilable fact had existed it is a case of conflict between the deposition in the Court and the statement under section 162 and the latter can be used to contradict the former. But if he had not stated under section 162 anything about the fact there is no conflict and the statement cannot be used to contradict him. In some cases an omission in the statement under section 162 may amount to contradiction of the deposition in Court; they are the cases where what is actually stated is irreconcilable with what is omitted and impliedly negatives its existence."

At a later stage of the judgment, the learned Judges laid down the following two tests to ascertain whether a particular omission amounts to contradiction : (i) an omission is not a contradiction unless what is actually stated contradicts what is omitted to be said ; and (ii) the test to find out whether an omission is contradiction or not is to see whether one can point to any sentence or assertion which is irreconcilable with the deposition in the Court. The said observations are in accord with that of the Madras High Court in In re *Guruva Vannan*[1]. The Patna High Court in *Badri Chaudhry* v. *King Emperor*[4], expressed a similar view. At page 22, Macpherson, J., analysing, section 162 of the Code of Criminal Procedure, after its amendment in 1923, observed :

"The first proviso to section 162 (1) makes an exception in favour of the accused but it is an exception most jealously circumscribed under the proviso itself. "Any part of such statement" which has been reduced to writing may in certain limited circumstances be used to *contradict* the witness who made it. The limitations are strict : (1) Only the statement of a prosecution witness can be used ; and (2) only if it has been reduced to writing ; (3) only a part of the statement recorded can be used ; (4) such part must be duly proved ; (5) it must be a contradiction of the evidence of the witness in Court ; (6) it must be used as provided in section 145, Evidence Act, that is, it can only be used after the attention of the witness has been drawn to it or to those parts of it which it is intended to use for the purpose of contradiction, and there are others. Such a statement which does not contradict the testimony of the witness cannot be proved in any circumstances and it is not permissible to use the recorded statement as a whole to show that the witness did not say something to the investigating officer."

In *Sakhawat* v. *Crown*[5] much to the same effect was stated at page 284 :

"The section (section 162) provides that such statements can be used only for the purpose of contradiction. Contradiction means the setting up of one statement against another and not the

1. (1944) 1 M.L.J. 253 : I.L.R. (1944) Mad. 894.
2. (1933) 64 M.L.J. 519: I.L.R. 56 Mad. 475 (476).
3. A.I.R. 1952 All. 289 (294).
4. A.I.R. 1926 Pat. 20 (23).
5. I.L.R. (1937) Nag. 277 (284).

setting up of a statement against nothing at all. An illustration would make the point clear. If a witness in Court says 'I saw *A* running away' he may be contradicted under section 162 by his statement to the police 'I did not see *A* running away'. But by proving an omission what the learned counsel contradicts is not the statement 'I saw *A* running away' but the statement 'I stated to the police that I saw *A* running away'. As section 162 does not allow the witness to depose 'I stated to the police that I saw *A* running away' it follows that there can be no basis for eliciting the omission. Our argument is further fortified by the use of the words "*any part* of such statement . . . may be used to contradict." It is not said that *whole* statement may be used. But in order to prove an omission the whole statement has to be so used as has been done in the present case."

The contrary view is expressed in the following proposition :

"An omission may amount to contradiction if the matter omitted was one which the witness would have been expected to mention and the Sub-Inspector to make note of in the ordinary course. Every detail is expected to be noted."

This proposition, if we may say so, couched in wide phraseology enables the trial Judge to put into the mouth of a witness things which he did not state at an earlier stage and did not intend to say, on purely hypothetical considerations. The same idea in a slightly different language was expressed by Bhargava and Sahai, JJ., in *Rudder* v. *The State*[1] at page 240 :

"There are, however, certain omissions which amount to contradictions and have been treated as such by this Court as well as other Courts in this country. Those are omissions relating to facts which are expected to be included in the statement before the police by a person who is giving a narrative of what he saw, on the ground that they relate to important features of the incident about which the deposition is made."

A similar view was expressed in *Mohinder Singh* v. *Emperor*[2], *Yusuf Mia* v. *Emperor*[3], and *State of M. P.* v. *Banshilal Behari*[4].

Reliance is placed by the learned counsel for the appellants on a statement of law found in "Wigmore on Evidence", Vol. III, 3rd Edn., at page 725. In discussing under the head "what amounts to a self-contradiction", the learned author tersely describes a self-contradiction in the following terms :

". . . it is not a mere difference of statement that suffices; nor yet is an absolute oppositeness essential; it is an inconsistency that is required."

The learned author further states, at page 733 :

"A failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact."

The said statement is no doubt instructive, but it cannot be pressed into service to interpret the provisions of section 162 of the Code of Criminal Procedure. In America, there is no provision similar to section 162 of the Code. It is not, therefore, permissible, or even possible, to interpret the provisions of a particular Act, having regard to stray observations in a text-book made in a different context.

It is not necessary to multiply cases. The two conflicting views may be briefly stated thus : (i) omissions, unless by necessary implication be deemed to be part of the statement, cannot be used to contradict the statement made in the witness-box ; and (ii) they must be in regard to important features of the incident which are expected to be included in the statement made before the police. The first proposition not only carries out the intention of the legislature but is also in accord with the plain meaning of the words used in the section. The second proposition not only stretches the meaning of the word "statement" to a breaking point, but also introduces an uncertain element, namely, ascertainment of what a particular witness would have stated in the circumstances of a particular case and what the Police-officer should have recorded. When the section says that the statement is to be used to contradict the subsequent version in the witness-box, the proposition brings in, by construction, what he would have stated to the police within the meaning of the word "statement". Such a construction is not permissible.

From the foregoing discussion the following propositions emerge : (1) A statement in writing made by a witness before a Police-officer in the course of investi-

1. A.I.R. 1957 All. 239 (240).
2. A.I.R. 1932 Lah. 103.
3. A.I.R. 1938 Pat. 579.
4. A.I.R. 1958 M.P. 13.

gation can be used only to contradict his statement in the witness-box and for no other purpose ; (2) statements not reduced to writing by the Police-officer cannot be used for contradiction ; (3) though a particular statement is not expressly recorded, a statement that can be deemed to be part of that expressly recorded can be used for contradiction, not because it is an omission strictly so-called but because it is deemed to form part of the recorded statement ; (4) such a fiction is permissible by construction only in the following three cases : (i) when a recital is necessarily implied from the recital or recitals found in the statement ; illustration : in the recorded statement before the police the witness states that he saw *A* stabbing *B* at a particular point of time, but in the witness-box he says that he saw *A* and *C* stabbing *B* at the same point of time ; in the statement before the police the word " only " can be implied *i.e.*, the witness saw *A* only stabbing *B* ; (ii) a negative aspect of a positive recital in a statement : illustration : in the recorded statement before the police the witness says that a dark man stabbed *B*, but in the witness-box he says that a fair man stabbed *B* ; the earlier statement must be deemed to contain the recital not only that the culprit was a dark complexioned man but also that he was not of fair complexion ; and (iii) when the statement before the police and that before the Court cannot stand together ; illustration : the witness says in the recorded statement before the police that *A* after stabbing *B* ran away by a northern lane, but in the Court he says that immediately after stabbing he ran away towards the southern lane ; as he could not have run away immediately after the stabbing, *i.e.*, at the same point of time, towards the northern lane as well as towards the southern lane, if one statement is true, the other must necessarily be false.

The aforesaid examples are not intended to be exhaustive but only illustrative. The same instance may fall under one or more heads. It is for the trial Judge to decide in each case, after comparing the part or parts of the statement recorded by the police with that made in the witness-box, to give a ruling, having regard to the aforesaid principles, whether the recital intended to be used for contradiction satisfies the requirements of law.

The next point is what are the omissions in the statement before the police which the learned Sessions Judge did not allow the accused to put to the witnesses for contradicting their present version. The learned counsel for the appellants contends that the accused intended to put to the witnesses the following omissions, but they did not do so as the learned Sessions Judge disallowed the two questions put to P.W. 30 and made a considered order giving his reasons for doing so, and that the learned counsel thought it proper not to put the same questions or other questions in regard to omisions to P.W. 30 or to the other witnesses that followed him. The said omissions are : (1) The warning by the members of the gang on their arrival to the audience at the music party not to stir from their places ; (2) the presence of a gas lantern ; (3) the chase of Bharat Singh by the assailants ; (4) the scrutiny of the dead bodies by the gang ; and (5) the return of the gang in front of the house of Bankey. The learned counsel for the respondent contests this fact and argues that only two omissions, namely, the presence of a gas lantern and the scrutiny of the dead bodies by the gang, were put in the cross-examination of P.W. 30 and no other omissions were put to him or any other witness, and that indeed the order of the learned Sessions Judge did not preclude him from putting all the omissions to the witnesses and taking the decision of the Judge on the question of their admissibility. He further contends that even before the learned Judges of the High Court the advocate for the appellants only made a grievance of his not having been allowed to put the aforesaid two omissions and did not argue that he intended to rely upon other omissions but did not do so as he thought that the learned Sessions Judge would disallow them pursuant to his previous order. Before the High Court an application was filed for summoning eight eye-witnesses on the ground that the learned Sessions Judge did not allow the counsel for defence to put the omissions amounting to material contradictions to them, but no mention was made in that application of the number of omissions which the accused intended to put to the witnesses if they were summoned. That application was filed on 1st May, 1957,

but no attempt was made to get a decision on that application before the arguments were heard. Presumably, the Court as well as the parties thought that the application could more conveniently be disposed of after hearing the arguments. On 30th July, 1957, *i.e.*, after the appellants were fully heard that application was dismissed and the detailed reasons for dismissing it were given in the judgment, which was delivered on 11th September, 1957. The judgment of the learned Judges of the High Court clearly indicates that what was argued before them was that two omissions sought to be put to P.W. 30 were disallowed and therefore the accused did not put the said omissions to the other witnesses. It was not contended on behalf of the accused that other omissions were intended to be used for contradiction, but were not put to the witnesses as the advocate thought that in view of the order of the learned Sessions Judge they would not be allowed automatically. The learned Judges held that the said two omissions amounted to material contradiction and that the learned Sessions Judge was wrong in disallowing them, but they ignored those two circumstances and based their findings on matters of greater certainty. If really the Judges had made a mistake in appreciating the arguments of the learned counsel for the appellants in the context of omissions, one would expect the accused to mention the said fact prominently in their application for Special Leave. Even if they omitted to mention that fact in the application for Special Leave, they could have filed an affidavit sworn to by the advocate, who appeared for them before the learned Judges of the High Court, mentioning the fact that in spite of the argument specifically directed to the other omissions the learned Judges by mistake or over-sight failed to notice that argument. The learned counsel who argued before us did not argue before the High Court, and, therefore, obviously he is not in a position to assert that the Judges committed a mistake in omitting to consider the argument advanced before them. But he made strenuous attempts before us to persuade us to hold that there must have been a mistake. He would say that the learned counsel had in fact relied upon all the aforesaid omissions in support of his contention that there was development of the case of the prosecution from time to time and therefore he must have also relied upon the said omissions in the context of the statements made under section 162 of the Code of Criminal Procedure ; on the other hand, the fact that the learned Judges considered all the alleged omissions in connection with the said contention and only considered two omissions in regard to the contention based on section 162 of the Code is indicative of the fact that the learned counsel, for reasons best known to him, did not think fit to rely upon all the alleged omissions. The deposition of P. W. 30 also shows that only two omissions in the statement before the police, *viz.*, the existence of a gas-lantern and the scrutiny of the dead bodies by the gang, were put to him in cross-examination and the learned Sessions Judge disallowed those questions on the ground that the learned counsel was not able to show any law entitling him to put the said questions. Though the witness was examined at some length, no other alleged omissions in the statement before the police were sought to be put to him. It would be seen from the short order made by the learned Sessions Judge at the time each one of the two questions were put, that the learned Sessions Judge did not give a general ruling that no omissions in a statement before the police could be put to a witness. The rulings were given, having regard to the nature of the omissions relied upon. But after the entire evidence of P.W. 30 was closed, the learned Sessions Judge gave a considered order. Even in that order, he did not rule out all omissions as inadmissible, but clearly expressed the view that if what was stated in the witness-box was irreconcilable with what was omitted to be stated in the statement, it could go in as material contradiction. Even after this order, it was open to the appellants to bring out all such omissions, but no attempt was made by them to do so. These circumstances also support the impression of the learned Judges of the High Court that what was argued before them was only in respect of the two specified omissions put to P. W. 30 in his cross-examination. We, therefore, hold that only two omissions relating to the existence of the gas-lantern and the scrutiny of the faces of the deceased by the appellants were put to P.W. 30 and were intended to be put to the other witnesses, but were not so done on the basis of the ruling given by the Court.

Would those two omissions satisfy the test laid down by us? The witness stated in the Court that there was a gas-lamp and that some of the miscreants scrutinised the faces of the dead bodies. In their statements before the police they did not mention the said two facts and some of the witnesses stated that there were lanterns. Taking the gas-lamp first: the scene of occurrence was not a small room but one spread over from the well to Bankey's house. From that omission in the statement it cannot necessarily be implied that there was no gas-lamp in any part of the locality wherein the incident took place; nor can it be said that, as the witnesses stated that there were lanterns, they must be deemed to have stated that there was no gas-lamp, for the word "lantern" is comprehensive enough to take in a gas-lantern. It is also not possible to state that the statements made before the police and those made before the Court cannot co-exist, for there is no repugnancy between the two, as even on the assumption that lantern excludes a gas-lantern, both can exist in the scene of occurrence. The same can be said also about the scrutiny of the faces of the dead bodies. In the statements before the police, the movements of the appellants were given. It was stated that they shot at the people and decamped with the gun of Bharat Singh. The present evidence that in the course of their pursuit, they looked at the faces of two of the dead bodies does not in any way contradict the previous versions, for the said incident would fit in with the facts contained in the earlier statements. The appellants could have shot at the audience, pursued them, taken the gun of Bharat Singh and on their way scrutinized the dead bodies. The alleged omission does not satisfy any of the principles stated by us.

In this view, it is unnecessary to express our opinion on the question whether, if the said two omissions amounted to contradiction within the meaning of section 162 of the Code of Criminal Procedure, the appellants were in any way prejudiced in the matter of their trial.

The last contention of the learned counsel for the appellants is that the learned Judges of the High Court acted illegally in testing the veracity of the witnesses with reference to the contents of the first information report. A perusal of the judgment of the High Court shows that the advocate for the appellants contended before them, *inter alia*, that the witnesses should not be believed as their present version was inconsistent with the first information report. Learned Judges assumed that the said process was permissible and even on that assumption they rejected the plea of the learned counsel for the appellants that there was improvement in the prosecution case. The learned Judges were really meeting the argument of the learned counsel for the appellants. It is idle to suggest that they erred in law in relying upon the first information report to discredit the witnesses for the simple reason that they accepted the evidence in spite of some omissions in the first information report.

In the result, we confirm the judgment of the High Court and dismiss the appeal.

Hidayatullah, J. (On behalf of *Imam, J.*, and himself).—The Judgment which I am delivering has been prepared by my learned brother, Imam, J., and myself.

We agree that the appeal be dismissed but would express in our own words the grounds upon which it should be dismissed.

The main contention advanced on behalf of the appellants was as follows: There was no fair trial of the appellants as they had been deprived of the right of cross-examination of the prosecution witnesses with reference to their statements made to the police during the police investigation. The trial Judge had disallowed two questions in this respect, and the lawyer for the appellants regarded the decision of the learned Judge as one which prevented him from putting further questions [...]h respect to other matters concerning the police statements of the witnesses. The [...] of the learned Judge had to be respected. The order of the learned Judge [...]egal, as on a proper interpretation of the provisions of section 162 of the Code [...]al Procedure, the appellants were entitled not only to put the two questions [...]re ruled out, but also questions with respect to other matters arising out [...]ce statements of the witnesses. The purpose of cross-examination is to

test the reliability of the witnesses both as to what they had to say about the occurrence itself and concerning their identification of those who had participated in it. There were several matters with respect to which, if questions had been allowed to be put, an effective cross-examination might have resulted and enabled the appellants to persuade the trial Judge to hold that the witnesses were entirely unreliable. In a case of this kind in which the appellants were involved, there were only two principal questions which were of vital importance : (1) how far the witnesses had improved their story in their evidence in Court from what they had said to the police concerning the occurrence, and (2) the existence of opportunity and sufficient light to enable proper identification.

It may be assumed, although it has been a matter of controversy, that the order of the trial Judge disallowing the two questions which were put was understood by the lawyer for the defence to mean that all similar questions in the nature of omissions in the police statements with respect to matters stated in Court would be disallowed and therefore no attempt was made to put further questions to the witnesses in this respect.

Unfortunately, the lawyer for the defence had not in this particular case laid any adequate foundation upon which the two questions, which were ruled out, could have been properly put. From that point of view, the order of the trial Judge in disallowing those questions was not improper. It could not, therefore, be said that the trial Judge had done anything which could be rightly characterised as infringement of the provisions of section 162 of the Code of Criminal Procedure or of the Indian Evidence Act, or even of the rules of natural justice.

Johari Chowkidar had reported the occurrence to the police station, which was a brief statement. Certain matters were, however, definitely mentioned—the names of the persons recognised in the occurrence, the number of persons killed and injured, the taking away of a gun which was with Bharat Singh, Bankey Kumhar firing his gun at the culprits in such a manner that some of them must have been injured, and the existence of light from the moon and lantern. The principal comment had been that in this report there was no mention of the culprits having advanced from the well towards the open place where villagers had gathered to hear the music. On the contrary, the first information report indicated that the firing was done from the parapet of the well. It is clear, however, from Johari's statement that the culprits had taken away the gun which was with Bharat Singh. This could only have been done if the culprits had advanced from the well to the place where the villagers had assembled.

It was then commented that in the first information report the culprits were said to have come from the southern lane, while in Court the evidence was that they had come to the well from the eastern lane. The discrepancy is a minor one. Johari must have been concerned with reporting the first firing from the well, and he might have mistaken the actual direction from which the culprits had approached the well. Johari's statement made no mention of the culprits uttering any warning that no one was to run away as they advanced from the well, whereas in Court the witnesses spoke to that effect. This was a detail which Johari might not have considered to be of sufficient importance, as he was anxious to make a bare statement in order to get the police to proceed to the place of occurrence as quickly as possible. Johari's statement also makes no mention of the culprits examining the bodies of the dead and examining their faces and exclaiming that Asa Ram, one of the men whom they wished to kill, had been killed. Here again, this was a matter of detail which Johari might not have considered necessary to mention. The first information report made no mention of the existence of gas light. It did, however, mention the existence of light of lantern and existence of moonlight. The existence of light from lantern and the full moon obviously was sufficient to recognise known persons. It is in evidence that the appellants were known for several years to the witnesses who have identified them as participants in the occurrence. It could not be said with absolute certainty that the mention of the existence of light of lantern excluded the existence of gas light. The statement of Johari gives clear indication that the

culprits did not remain all the time at the well, because they must have advanced to take away the gun which was with Bharat Singh. The culprits must have stayed at the place of occurrence for some time to enable Bankey Kumhar to fire his gun at them and to convey to Johari's mind the certainty that some of the culprits must have been injured. Reference is made only to some of the details and not to all the discrepancies pointed out in order to determine whether the alleged improvement in the story of the witnesses in Court from what they are alleged to have stated to the police was with reference to vital matters, which went to the root of the prosecution case.

It is apparent from what has been stated above that even if the defence had been allowed to put questions concerning these alleged omissions in the statement of the witnesses to the police, it could not have made their evidence in Court unreliable with respect to any material particular concerning the occurrence or the identification of the accused.

From the above, it seems to us that there is no merit in the appeal. As, however, considerable argument has been made concerning the right of cross-examination and as to how the provisions of section 162 of the Code of Criminal Procedure should be construed, it becomes necessary to consider the submissions of the learned counsel for the appellants.

The provisions of the Code of Criminal Procedure of 1861 and 1872 have been referred to by our learned brother, Subba Rao, J. Section 162 of the Code of 1872 made it clear that except for a dying declaration and matters coming within the provisions of section 27 of the Indian Evidence Act of 1872 no statement of any person made to a Police-officer in the course of investigation if reduced into writing, could be used as evidence against the accused. There was no restriction as to the extent of the right of an accused to cross-examine a prosecution witness concerning his statement. to the police. Section 162 of the Code of 1898 prohibited the use of a statement reduced into writing, as evidence except any statement falling within the provisions of section 32 of the Indian Evidence Act, 1872. The proviso to this section, however, expressly stated that in spite of the prohibition in the main provision, the accused could use such a statement to impeach the credit of the witnesses in the manner provided in the Indian Evidence Act of 1872. It will be seen therefore that until 1898 there was no restriction imposed upon the accused as to the extent of his right of cross-examination. As section 162 of the Code of 1898 entirely prohibited the use of the statement reduced into writing as evidence, the proviso to it safeguarded the right of the accused to impeach the credit of such witness in the manner provided in the Indian Evidence Act, 1872. Under the Indian Evidence Act, a witness' credit can be impeached under sections 145 and 155 of that Act. The manner in which the provisions of these sections could be utilised to impeach the credit of a witness covers a wide field. If, however, it was intended to contradict a witness concerning his previous statement reduced into writing, then the provisions of section 145 require that those parts of the writing by which it was sought to contradict the witness must be shown to him. There can be no doubt that the provisions of the Code from 1861 to 1898 in no way curbed the right of cross-examination on behalf of the accused. The provisions were intended to protect the accused in that no statement of a witness to the police reduced into writing could be used as evidence against him, but the right to cross-examine the witness to the fullest extent in accordance with the provisions of the Indian Evidence Act in order to show that he was unreliable, remained unaffected. The real question for consideration is whether the amendment of the Code in 1923 brought about such a radical change in the provisions of section 162 of the Code as to suggest that the Legislature had taken a retrograde step, and had intended to deprive the accused of the right of cross-examination of prosecution witnesses concerning their police statements except in one restricted particular, namely, to make use of the statements reduced into writing to contradict the witnesses in the manner provided by section 145 of the Indian Evidence Act.

The provisions of section 162 of the Code of 1898 were amended in 1923 in the hope that the amendment would resolve the various doubts which had sprung up.

as the result of divergent judicial opinions as to the meaning of these provisions. The provisions of section 162 of the Code of 1898 had been variously construed, and the amendment in 1923 has not improved matters. The amended section still remains difficult to construe. We shall endeavour now to construe it.

Under section 161 of the Code, the Police-officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case. He may also reduce into writing any statement made to him in the course of such examination, and if he does so, he must make a separate record of the statement of each such person.

The Legislature has, however, put restrictions upon the use of such statements at the inquiry or trial of the offence. The first restriction is that no statement made by any person to a Police-officer, if reduced into writing, be signed by the person making it. The intention behind the provision is easy to understand. The Legislature probably thought that the making of statements by witnesses might be thwarted, if the witnesses were led to believe that because they had signed the statements they were bound by them, and that whether the statements were true or not, they must continue to stand by them. The Legislature next provides that a statement, however recorded, or any part of it shall not be used for any purpose (save as provided in the section) at the inquiry or trial in respect of any offence under investigation at the time such statement is made. The object here is not easily discernible, but perhaps is to discourage over-zealous Police-officers who might otherwise exert themselves to improve the statements made before them. The Privy Council considered the intention to be :

"If one had to guess at the intention of the Legislature in framing a section in the words used, one would suppose that they had in mind to encourage the free disclosure of the information or to protect the person making the statement from a supposed unreliability of police testimony as to alleged statements or both."

It is possible that the Legislature had also in mind that the use of statements made under the influence of the investigating agency might, unless restricted to a use for the benefit of the accused, result in considerable prejudice to him. But whatever the intention which led to the imposition of the restrictions, it is manifest that the statements, however recorded, cannot be used except to the extent allowed by the section. The prohibition contained in the words 'any purpose' is otherwise absolute.

Then follow two provisos. The first gives the right to the accused to make use of the statements for contradicting a witness for the prosecution in the manner provided by section 145 of the Indian Evidence Act. It also gives a right to the prosecution to use the statement for purposes of re-examination of the same witness but only to explain any matter referred to in the cross-examination of the witness.

The first proviso, when analysed gives the following ingredients :

(*i*) A prosecution witness is called for the prosecution ;

(*ii*) whose statement has previously been reduced to writing ;

(*iii*) The accused makes a request ;

(*iv*) The accused is furnished with a copy of the previous statement ;

(*v*) In order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of the Indian Evidence Act.

If the accused exercises the right in (*v*) above in any instance, then the prosecution has the right to use the statement in the re-examination of the witness but only to explain any matters referred to by him in cross-examination.

Section 145 of the Indian Evidence Act reads :

"*Cross-examination as to previous statements in writing* : A witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question, without such writing being shown to him or being proved ; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

The section analysed gives the following result:

(1) Witnesses can be cross-examined as to previous statements in writing or reduced into writing;

(2) These writings need not be shown to the witnesses or proved beforehand;

(3) But if the intention is to contradict them by the writings,

(a) their attention must be drawn to those parts which are to be used for contradiction;

(b) This should be done before proving the writings.

Our learned brother, Subba Rao, J., restricts the use by the accused of the previous statements to the mechanism of contradiction as detailed in (3) above, but says that the accused has no right to proceed under (1) and (2). He deduces this from the words of section 162 of the Code of Criminal Procedure, where it is provided:

"in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872."

The fact that the accused can use the previous statement for the purpose of contradicting, shows that the previous statement cannot be used for corroborating the witness. Also there must be some basis for contradicting. This may arise, because of there being a contrary statement, irreconcilable statement or even material omissions. The accused can establish a contradiction by cross-examining the witness but only so as to bring out a contradiction and no more. We regret we cannot agree (and we say this with profound respect) that the accused is not entitled to cross-examine but only to contradict. In our opinion, the reference to section 145 of the Indian Evidence Act brings in the whole of the manner and machinery of section 145 and not merely the second part. In this process, of course, the accused cannot go beyond section 162 or ignore what the section prohibits but cross-examination to establish a contradiction between one statement and another is certainly permissible.

This question loses much of its importance when there are patent contradictions and they can be put to the witness without any cross-examination as in the two statements:

(a) I saw *A* hit *B*.

(b) I did not see *A* hit *B*.

But there are complex situations where the contradiction is most vital and relevant but is not so patent. There are cases of omissions on a relevant and material point. Let us illustrate our meaning by giving two imaginary statements:

(a) When I arrived at the scene I saw that *X* was running away chased by *A* and *B* who caught him.

(b) When I arrived at the scene I saw *X* take out a dagger from his pocket, stab *D* in his chest and then take to his heels. He was chased by *A* and *B* who caught him.

There is an omission of two facts in the first statement, *viz.*, (a) *X* took out a dagger from his pocket, and (b) he stabbed *D* in the chest. These two statements or their omission involve a contradiction as to the stage of the occurrence, when the observation of the witness began.

What section 145 of the Indian Evidence Act provides is that a witness may be contradicted by a statement reduced into writing and that is also the use to which the earlier statement can be put under section 162 of the Code of Criminal Procedure. When some omissions occur, there is contradiction in one sense but not necessarily on a relevant matter. The statements of witnesses may and do comprise numerous facts and circumstances, and it happens that when they are asked to narrate their version over again, they omit some and add others. What use can be made of such omissions or additions is for the accused to decide, but it can-

not be doubted that some of the omissions or additions may have a vital bearing upon the truth of the story given. We do not think that by enacting section 162 in the words used, the Legislature intended a prohibition of cross-examination to establish which of the two versions is an authentic one of the events as seen by the witness. The use of the words " re-examination " and " cross-examination " in the same proviso shows that cross-examination is contemplated or in other words, that the manner of contradiction under section 145 of the Indian Evidence Act comprises both cross-examination and contradiction. Indeed, the second part is only the final stage of the contradiction, which includes the earlier stages. Re-examination is only permissible where there is cross-examination.

It must not be overlooked that the cross-examination must be directed to bringing out a contradiction between the statements and must not subserve any other purpose. If the cross-examination does anything else, it will be barred under section 162, which permits the use of the earlier statement for contradicting a witness and nothing else. Taking the example given above, we do not see why cross-examination may not be like this :

Q. I put it to you that when you arrived on the scene *X* was already running away and you did not actually see him stab *D* as you have deposed to-day?

A. No I saw both the events.

Q. If that is so, why is your statement to the police silent as to stabbing?

A. I stated both the facts to the police.

The witness can then be contradicted with his previous statement. We need hardly point out that in the illustration given by us, the evidence of the witness in Court is direct evidence as opposed to testimony to a fact suggesting guilt. The statement before the police can only be called circumstantial evidence of complicity and not direct evidence in the strict sense.

Of course, if the questions framed were :

Q. What did you state to the police? or

Q. Did you state to the police that *D* stabbed *X*?

they may be ruled out as infringing section 162 of the Code of Criminal Procedure, because they do not set up a contradiction but attempt to get a fresh version from the witnesses with a view to contradicting him. How the cross-examination can be made must obviously vary from case to case, counsel to counsel and statement to statement. No single rule can be laid down and the propriety of the question in the light of the two sections can be found only when the facts and questions are before the Court. But we are of opinion that relevant and material omissions amount to vital contradictions, which can be established by cross-examination and confronting the witness with his previous statement.

The word " contradict " has various meanings, and in the Oxford English Dictionary it is stated as "To be contrary to in effect, character, etc.; to be directly opposed to ; to go counter to, go against " as also " to affirm the contrary of; to declare untrue or erroneous; to deny categorically" and the word "contradiction" to mean " A state or condition of opposition in things compared ; variance ; inconsistency, contrariety ". In Shorter Oxford English Dictionary, " contradict " is said to mean " To speak against; to oppose in speech ; to forbid; to oppose; to affirm the contrary of; to declare or erroneous ; to deny ; to be contrary to; to go counter to and go against" and "contradiction" to mean " A state of opposition in things compared; variance; inconsistency". The meaning given to the words "contradict" and "contradiction" in these Dictionaries must at least include the case of an omission in a previous statement which by implication amounts to contradiction and therefore such an omission is a matter which is covered by the first proviso to section 162 and questions in cross-examination can be put with respect to it in order to contradict the witness. It is difficult to say as an inflexible rule that any other kind of omission cannot be put to a witness in order to contradict him, when the proper foundation had been laid for putting such questions. The words " to contradict him " appearing in section 145 of the Evidence Act must carry the

same meaning as the words "to contradict such witness" in section 162 of the Code. In a civil suit, where the provisions of section 162 of the Code of Criminal Procedure have no application, would it be correct to say that only questions concerning omissions of the kind suggested by our learned brother could be put and none other? We cannot see why a question of the nature of cross-examination regarding an omission with respect to a matter which the witness omitted to make in his previous statement and which, if made, would have been recorded, cannot be put. The facts and circumstances of each case will determine whether any other kind of omission than that referred to by our learned brother could be put to a witness in order to contradict him. It would be for the Judge decide in each case whether in the circumstances before him the question could be put. The purpose of cross-examination is to test the veracity of the statement made by a witness in his examination-in-chief as also to impeach his credit. Not only is it the right of the accused to shake the credit of a witness, but it is also the duty of the Court trying an accused to satisfy itself that the witnesses are reliable. It would be dangerous to lay down any hard and fast rule.

We pause to look at the matter from another angle. We shall assume that the interpretation which the State claims should be put upon section 162 (1) is correct and compare the respective rights of the accused and the prosecution. According to this interpretation, the accused has no right of cross-examination in respect of the contradiction. This means that no question can be put about the previous statement but only the part in which there is a contradiction can be brought to the witness's notice and his explanation, if any, obtained. In other words, there is only " contradiction " and no more. But when the accused has used the statement to contradict the witness—it may be only on one point—what are the rights of the prosecution ? The prosecution can use *any part of the statement* in the re-examination not only to explain the ' contradiction ' but also *to explain any matter referred to in the cross-examination of the witness.*

If ' contradiction ' does not include the right of cross-examination, the right of the prosecution must necessarily extend to re-examination in respect of *any other* matter needing explanation in the cross-examination at large. Thus, the accused cannot ask a single question of the nature of cross-examination but because he sets up a ' contradiction ' in the narrow sense, the prosecution can range all over the previous statement and afford the witness a chance of explaining any matter in his cross-examination by re-examining him which right includes the possibility of asking leading questions with the permission of the Court.

Thus, the accused makes a ' contradiction ' at his own peril. By making a single ' contradiction ', the accused places the entire statement in the hands of the prosecution to explain away everything with its assistance. One wonders if the Legislature intended such a result, for it is too great a price for the accused to pay for too small a right. Fortunately, that is not the meaning of section 162 of the Code of Criminal Procedure, and it is not necessary to read the word ' cross-examination" in the proviso in a sense other than what it has.

The right of both the accused and the prosecution is limited to contradictions. It involves cross-examination by the accused as to that contradiction within section 145 of the Indian Evidence Act and re-examination in relation to the matters ' referred to in the cross-examination of the witness '. The prosecution cannot range at will to explain away every discrepancy but only such as the accused under *his* right has brought to light. In our opinion, reading the section in this way gives effect to every part and does not lead to the startling and, if we may say so, the absurd results which we have endeavoured to set out above.

The question may be asked, how is there to be a cross-examination about a previous statement ? It is difficult to illustrate one's meaning by entering into such an exposition. Any one interested to see the technique is invited to read *Mrs. Maybrick's Trial* in the Notable English Trials (1912) at pages 77-79, the *Trial of William Palmer*, pages 35-36, 50-51. Examples will be found in every leading

trial. The question is, did the Legislature intend giving this right? In our opinion, the Legislature did and for the very obvious reason that it gave the prosecution also a chance to re-examine the witness, to explain 'any matter referred to in the cross-examination of the witness'.

We respectfully do not agree that the section should be construed in the way our learned brother has construed it. Though we agree as to the result, our opinion cannot be left unexpressed. If the section is construed too narrowly, the right it confers will cease to be of any real protection to the accused, and the danger of its becoming an impediment to effective cross-examination on behalf of the accused is apparent.

This brings us to the consideration of the questions, which were asked and disallowed. These were put during the cross-examination of Bankey, P.W. 30. They are:

Q. Did you state to the investigating officer that the gang rolled the dead bodies of Nathi, Saktu and Bharat Singh and scrutinized them, and did you tell him that the face of Asa Ram resembled that of the deceased Bharat Singh?

Q. Did you state to the investigating officer about the presence of the gas lantern?

These questions were defective, to start with. They did not set up a contradiction but attempted to obtain from the witness a version of what he stated to the police, which is then contradicted. What is needed is to take the statement of the police as it is, and establish a contradiction between that statement and the evidence in Court. To do otherwise is to transgress the bounds set by section 162 which, by its absolute prohibition, limits even cross-examination to contradictions and no more. The cross-examination cannot even indirectly subserve any other purpose. In the questions with which we illustrated our meaning, the witness was not asked what he stated to the police, but was told what he had stated to the police and asked to explain the omission. It is to be borne in mind that the statement made to the police is 'duly proved' either earlier or even later to establish what the witness had then stated.

In our opinion, the two questions were defective for the reasons given here, and were properly ruled out, even though all the reasons given by the Court may not stand scrutiny. The matter was not followed up with proper questions, and it seems that similar questions on these and other points were not put to the witness out of deference (as it is now suggested) to the ruling of the Court. The accused can only blame themselves, if they did not.

The learned Judges of the High Court ruled out from their consideration that these two circumstances made it possible for the witnesses to recognise the accused, but held that there was ample opportunity even otherwise for the witnesses to do so. The High Court was justified in so doing, and there being ample evidence on which they could come to the conclusion that the witnesses had, in fact, recognised the accused, it must inevitably be regarded as one of fact in regard to which this Court does not interfere.

Since no other point was argued, the appeal must fail, and we agree that it be dismissed.

Appeal dismissed.

SUPREME COURT OF INDIA.

PRESENT :—B. P. SINHA, J. L. KAPUR AND M. HIDAYATULLA, JJ.

(Civil Appellate Jurisdiction.)

The Commissioner of Income-tax, West Bengal .. *Appellant**

v.

The Calcutta Stock Exchange Association, Ltd. .. *Respondents.*

Income-tax Act (XI of 1922), section 10 (6)—Scope and applicability—" Perform specific services ", "remuneration " and " definitely related ", interpretation of—Services contemplated under, if should have reference to " matter outside the mutual dealings within the objects of the Association ".

During the accounting year 1944-45 (assessment year 1945-46) the respondent Calcutta Stock Exchange Association, Ltd., had received from certain of its members the sum of Rs. 60,750 as entrance fees and Rs. 15,687 as subscriptions in respect of their Authorised Assistants as also a sum of Rs. 16,000 as fees for enlisting the names of companies in the Quotation List as provided by the bye-laws.

The High Court of Calcutta, on a reference under section 66 (1) of the Income-tax Act (XI of 1922) at the instance of the (respondent) assessee, held against the Revenue on the following interpretation put upon section 10 (6) of the said Act; it observed that the assessee, undoubtedly a trade association, did not perform any specific services for its members for remuneration ' under an arrangement of direct character ' and the receipts aforesaid, did not fall under sub-section (6) of section 10 and so was not chargeable to income-tax. Hence this appeal by the Department to the Supreme Court.

Held :—The words " performing specific services " mean, in the context of a trade, professional or other association, " conferring particular benefits " on the members thereof.

" Remuneration " though it includes ' wages ' may mean payments which may not be called 'wages '. It is a term of much wider import including 'recompense ', ' reward ', 'payment ', etc. It is not correct to equate ' remuneration ' with wages as the High Court has done..

The use of the word ' deemed ' shows that the Legislature was deliberately using the fiction of treating such services as ' business ' which otherwise it might not have been.

The sub-section further requires that the remuneration should be " definitely related " to the services ; *i.e.*, it should be shown that those services would not be available but for specific payments (fees, subscriptions, etc.) charged by the Association for performing those services.

On the above interpretation of the crucial words of the sub-section (6) of section 10, the items of receipts or income have to be examined to determine if they answer the description of the ' services ' contemplated by that sub-section.

The entrance fees (Rs. 60,750), is a price paid for the services of the Association in making suitable arrangements for an absentee member to transact business on his behalf and in his name by his Authorised Assistants.

The sum of Rs. 15,678 realised from members by way of subscriptions in respect of their Authorised Assistants consists of the contributions severally made by the members periodically, members who found it worth their while to enagage the services of Authorised Assistants so as to continue to have the substantial benefit conferred by the Association of having the use of their representatives during their absence.

The sum of Rs. 16,000 represents fees received from members for allowing their application for enlisting the names of companies not already in the quotation list. Apparently those members are interested in placing the stocks of those companies on the market. It cannot therefore be denied that sum of money is ' definitely related ' to specific purposes performed by the Association, namely, to permit transactions in respect of the shares of the comapanies concerned which would not otherwise be available to the members or any of them.

Thus the requirements of sub-section (6) of section 10 have been fulfilled in respect of these receipts.

It cannot be contended that the ' services ' must have reference to "matters outside the mutual dealing for which the Association was formed". (The High Court had accepted this contention). There is no warrant for limiting the application of the words used in the sub-section, in the way suggested. Further the mutuality extends only to such benefits as accrue to every member on the payment made by him but not to additional services performed by the Association to certain members in consideration of additional items of payment made by those members as prescribed by the bye-laws.

The three items of income, on a true construction of the provisions of sub-section (6) and on facts and circumstances of the instant case fall within the taxing statute.

Appeal from the Judgment and Decree, dated the 6th January, 1956, of the Calcutta High Court in Income-tax Reference No. 74 of 1953.

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* C.A. No. 204 of 1958. 26th March, 1959.

K. N. Rajagopal Sastri, R. H. Dhebar and *D. Gupta*, Advocates, for Appellant.

Dr. Radha Binod Pal, Senior Advocate (*Panchanan Pal* and *D. N. Mukherjee*, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Sinha, J.—The question for determination in this appeal on a certificate of fitness granted by the High Court of Calcutta, is whether the respondent's admitted income under certain heads, is chargeable to income-tax under the provisions of section 10 (6) of the Indian Income-tax Act (XI of 1922) hereinafter referred to as the Act. The Calcutta High Court, by its judgment, dated January 6, 1956, answered the question in the negative, disagreeing with the determination of the Income-tax Appellate Tribunal by its order, dated April 23, 1949.

The facts of this case, upon which the decision of the appeal depends, may shortly be stated as follows: The respondent is a limited liability company incorporated on June 7, 1933, with a view to taking over the assets and liabilities of an unincorporated association called "The Calcutta Stock Exchange Association" and to carrying on the affairs of the Stock Exchange which had been founded by that Association. The principal object of the respondent-Company is to facilitate the transaction of business on the Calcutta Stock Exchange. In view of that objective, the Company had to make rules and by-laws, regulating the mode and the conditions in, and subject to, which the business of the Stock Exchange had to be transacted. The Company is composed of " members " who may be either individuals or firms, who, except in the case of parties who had been members of the unincorporated Association have to be elected as such, and upon such elections, have to acquire a share of the Company and pay an entrance fee. The members have to pay a monthly subscription according to the by-laws of the Company. Under the by-laws of the respondent-Company, members with a certain standing are allowed to have " Authorized Assistants " up to a maximum of six in number. Such Authorized Assistants are permitted the use of the premises of the Association and to transact business therein in the names and on behalf of the members employing them. The members have to pay an admission fee for such Authorized Assistants according to the following scale :

" (*a*) for the first two Assistants	..	Rs. 1,000
(*b*) for the third Assistant	..	Rs. 2,000
(*c*) for the fourth Assistant	..	Rs. 3,000
(*d*) for the fifth Assistant	..	Rs. 4,000
(*e*) for the sixth Assistant	..	Rs. 5,000
(*f*) for replacement	..	Rs. 1,000."

The last item of replacement fee of Rs. 1,000 is meant to cover the fee for substituting one Assistant by another. Before these by-laws were amended with effect from July 10, 1944, a member could have more than six such Assistants, but the number was limited to six by the new amendment which also provided that

" Members who have more than six Assistants, at present, shall not be allowed any replacement unless the number of Assistants in their firms has come down to six (maximum fixed)."

Rule (5), as amended, is in these terms :

"Every candidate applying for admission as Assistant to a member must serve at least for one year as a probationer in the firm of that member. A probationer must apply to the Committee (through the member in whose office he will serve as probationer) in such form as may be prescribed by the Committee by paying Rs. 100 as probationer fee which will not be refunded in any circumstances."

It would, thus, appear that the rules relating to the admission of members Assistants, confer the benefit upon those members only—either individuals or firms—who are qualified according to the by-laws to have such Assistants, and who have paid admission fees and pay a monthly subscription in respect of each of them, besides their own dues, to the Company. The number of such Assistants has been sought by the by-laws to be limited up to a maximum of six, by imposing a progressively

enhanced admission fee, apparently, with a view to discouraging the employment of a large crowd of such "Authorized Assistants". The by-laws also provide that:

"an authorized assistant shall not enter into any contracts on his own behalf and all contracts made by him shall be made in the name of the member employing him and such member shall be absolutely responsible for the due fulfilment of all such contracts and for all transactions entered into by the authorized assistant on his behalf."

It is also contemplated by the by-laws that tickets have to be issued to the Authorised Assistants, besides the members' tickets. The by-laws also contemplate that a member shall give to the prescribed Authority of the Company, an immediate notice in writing, of the termination of the employment by him of any Authorized Assistant, and on such termination, the right of the Assistant to use the rooms of the Association, shall cease, and he shall not be at liberty to transact business in the name and on behalf of his employer. The by-laws also make provision for the supervision of the work of the Authorized Assistants to see that they function within the limits of their powers, and do not transact business on behalf of persons or firms other than those employing them.

During the accounting year 1944-45 (assessment year 1945-46), the respondent-Company received from its members the sum of Rs. 60,750 as entrance fee and the sum of Rs. 15,687 as subscription in respect of the Authorised Assistants. The Company also received during the aforesaid year, a sum of Rs. 16,000 as fees for putting the names of companies on the Quotations List. Unless a particular company's name is placed on the Quotations List, no dealings in respect of the shares of that Company are permitted on the Stock Exchange. An application has to be made by a member to place on the Quotations List any Company not already included in that List, and on approval by the prescribed Authority of the Company, the name of the Company thus proposed, is included in the List upon payment of a certain fee. The Companies themselves cannot apply to the Association for such enlistment. The application has to be made by a member, and has to be accompanied by a fee of Rs. 1,000, and it is only after the necessary scrutiny and investigation into the affairs of the proposed Company have been made, that the enlistment applied for is granted. That is another source of income to the respondent-Company. It is no more necessary to refer to another item of income which was admitted, during the course of the assessment proceedings in their appellate stage, to be liable to the payment of tax. We are, thus, concerned in the present controversy with the aforesaid sums of Rs. 60,750, Rs. 15,687 and Rs. 16,000 which were held by the Income-tax Officer, by his order, dated March 27, 1946, to be liable to income-tax. The Income-tax Officer rejected the contention raised on behalf of the assessee-Company that the Authorised Assistants aforesaid were themselves members of the Company, and that therefore, the moneys received from them were exempt from taxation. He also held that though the respondent-Company was a mutual Association, each one of the three items of income, referred to above, was remuneration definitely related to specific services performed, and was thus, chargeable to tax within the meaning of section 10 (6) of the Act. On appeal, the Appellate Assistant Commissioner, by his order, dated June 30, 1947, considered the points at great length, and came to the conclusion that the Authorised Assistants were not members or substitute members. He held that the Authorised Assistants were no more than representatives of the members who employ them, and they transact business on their behalf, and that the Association had framed rules and by-laws, regulating the admission, supervision and discontinuance of such Authorized Assistants. For coming to this conclusion, he relied upon the decision of the Bombay High Court in the case of *Native Share & Stock-Brokers' Association* v. *The Commissioner of Income-tax, Bombay*[1]. The case was then taken up in appeal to the Income-tax Appellate Tribunal, which dismissed the appeal. The Tribunal agreed with the finding of the taxing authorities that the Authorised Assistants were not members of the Company within the meaning of the Articles of Association of the Company, and that their position was analogous to that of the "authorised

1. (1946) 14 I.T.R. 628.

clerks in Native Share and Stock-Brokers' Association at Bombay ". In the course of its order, the Tribunal observed as follows :—

> " The provisions made in the regulations of the Company by which a member can take advantage of sending his authorized assistants to the Company for transacting the business in the member's name is nothing but giving extra facilities to the members. By controlling the institution of authorized assistants the Company renders speccific services to the members and in particular to the member whose assistants work for him. The amounts received by the Company from these sources are clearly covered by the provisions of section 10 (6)."

At the instance of the assessee, the Tribunal stated a case and referred the following questions of law to the High Court for its decision under section 66 (1) of the Act :—

> " (1) Whether on the facts of this case the Income-tax Appellate Tribunal was right in holding that Authorized Assistants were not members of the Company and as such the amounts of Rs. 15,687 and Rs. 60,750 received from them as subscriptions and entrance fees respectively should be included in the assessable income.
>
> (2) Were these amounts received for specific services performed by the Association or its members within the meaning of sub-section (6) of section 10 of the Indian Income-tax Act ?
>
> (3) Whether the sums of Rs. 16,000 and Rs. 600 were remuneration definitely related to specific services performed by the Association for its members within the meaning of sub-section (6) of section 10."

The reference was heard by a Division Bench consisting of Sir Trevor Harries, C.J., and Banerjee, J., of the Calcutta High Court. Before that Bench, certain concessions were made. It was conceded by Dr. Pal, who also appeared before that Bench, that the Authorized Assistants were not members of the Company. It was also agreed at the bar, on behalf of both the parties, that the two sum of Rs. 60,750 and Rs. 15,687 were not received from the Authorized Assistants, as suggested in the question formulated, and that it was common ground that they were received from members of the Association in respect of their Authorized Assistants. Therefore, the High Court took the view that the questions framed by the Tribunal did not arise, and that the Tribunal had proceeded on a wrong basis of facts. The High Court, therefore, re-cast the questions in these terms :—

> " Whether in the facts and circumstances of this case the Income-tax Appellate Tribunal was right in holding that
>
> (*a*) the amounts of Rs. 15,687 and Rs. 60,750 received from the members of the Association as subscriptions and entrance fees in respect of Authorized Assistants, and
>
> (*b*) the amounts of Rs, 16,000 and Rs. 600 received as fees for enlisting names of newly floated Companies and for recognition of changes in the styles of firms respectively should be included in the assessable income of the assessees."

The Tribunal was asked to re-state a case upon the question as re-cast, extracted above.

Accordingly, the Tribunal drew up a fresh statement of the case and re-submitted it to the High Court. On this re-statement of the case, the matter was heard by a Bench consisting of Chakravarti, C.J., and Sarkar, J. The High Court considered the terms of section 10 (6) of the Act, and came to the conclusion that the case had not been brought within those terms. The High Court, in the course of its opinion, observed that though the assessee is undoubtedly a trade association, it did not perform any specific services for its members for remuneration. It then examined in detail the decision of the Bombay High Court in the case of *Native Share & Stock Brokers' Association* v. *The Commissioner of Income Tax, Bombay*[1], relied upon by the Department, and observed that the differences pointed out between the case in hand and the case decided by the Bombay High Court, were " not vital, though they are not immaterial", but it was not prepared to take the same view of the facts of this case as had been taken by the Bombay High Court in the case referred to above, or by the Travancore-Cochin High Court in the case of *Commissioner of Income-tax* v. *Chamber of Commerce, Alleppey*[2]. The High Court accepted the argument of

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1. (1940) 14 I.T.R. 628. 2. (1955) 27 I.T.R. 535.

Dr. Pal, which is also addressed to us, that the words "performing specific services for" were far stronger and more definite than the the words " render service to " and that those words meant the actual doing of definite acts in the nature of services. The Court further observed that those words meant "execute certain definite tasks in the interests and for the benefit of the latter (that is to say, the members) under an arrangement of a direct character ". It further observed that the words " for remuneration " and " definitely related to those services " meant that " certain specific tasks must be performed or functions of a specific character must be discharged for payment and such payment is to be made to the Association as wages for its labour in respect of those tasks or functions." In this connection, it may be added that the High Court also made the following observations bearing on the construction of the crucial words of section 10 (6) :

> "When section 10 (6) speaks of a trade, professional or other similar Association performing specific services for its members for remuneration, it contemplates, I think, services in regard to matters outside the mutual dealings for which the Association was formed and for the transaction of which it exists as a mutual Association. If performance of functions even in regard to matters within the objects of the Association as a mutual Association be performance of specific service within the meaning of the sub-section, discharge of no function can be outside it and everything done would be specific service performed. That, I do not think, is what the sub-section means and intends."

It is manifest that unless the assessee is brought within the terms of sub-section (6) of section 10, the three items of income coming into the hands of the Association would not be chargeable to income-tax. That sub-section is in these terms :—

> "(6) A trade, professional or similar Association performing specific services for its members for remuneration definitely related to those services shall be deemed for the purpose of this section to carry on business in respect of those services, and the profits and gains therefrom shall be liable to tax accordingly."

It has to be observed at the outset that the performing of the services of the description mentioned in that sub-section, may not, but for the words of that section, have amounted to carrying on business in respect of those services. The use of the word " deemed " shows that the Legislature was deliberately using the fiction of treating something as business which otherwise it may not have been. It is also noteworthy that the sub-section is couched in rather emphatic terms. We have, therefore, to examine the terms of the sub-section to see whether the three sums of money in question, or any of them, are or is within the ambit of those terms. The words " performing specific services ", in our opinion, mean, in the context "conferring particular benefits" on the members. The word " services " is a term of a very wide import, but in the context of section 10 of the Act, its use excludes its theological or artistic usage. With reference to a trade, professional or similar Association, the performing of specific services must mean conferring on its members some tangible benefit which otherwise would not be available to them as such, except for payment received by the Association in respect of those services. The word " remuneration ", though it includes " wages ", may mean payment, which strictly-speaking, may not be called " wages ". It is a term of much wider import including " recompense ", " reward ", " payment ", etc., It, therefore, appears to us that the learned Chief Justice was not entirely correct in equating " remuneration " with " wages ". The sub-section further requires that the remuneration should be " definitely related " to the specific services. In other words, it should be shown that those services would not be available to the members or such of them as wish to avail themselves of those services, but for specific payments charged by the Association as a fee for performing those services. After these observations bearing on the interpretation of the crucial words, we shall now examine each of the three items of income, separately, to determine the question whether they answer, or any of them answers, the description of " services " contemplated by the sub-section.

Firstly, the sum of Rs. 60,750 has been realised from such members as applied for and obtained permission of the Association to have the use of Authorised Assistants within the precincts of the Stock Exchange. There cannot be the least doubt that unless those members paid the prescribed entrance fees for one or more Authorized Assistants up to a maximum of six, they could not have the benefit thus

conferred upon such members. Ordinarily, a member has to transact business in the precincts of the Association by himself or by his business partner if there is a firm; but if that member is a very busy person, and wishes to avail of the services of Authorized Assistants, he has to pay the prescribed fee. A member of the Association, with the advantage of mutuality, so long as he transacts business within the precincts of the Association, by himself or by his partner in the case of a firm, is not required to pay any such entrance fee but only the fee payable by every member as such. The entrance fee, thus, is clearly chargeable only from such of the members as avail themselves of the benefit conferred by the rules of the Association in that behalf. The entrance fee is, thus, a price paid for the services of the Association in making suitable arrangements for an absentee member to transact business on his behalf and in his name by his representative or agent. The entrance fee in question, therefore, cannot but be ascribed to the specific services rendered by the Association in respect of Authorized Assistants who thus become competent to transact business on behalf of their principal.

Coming next to the sum of Rs. 15,687 which was realised from the members by way of subscription in respect of their Authorized Assistants, it is clear that this sum consists of the contributions severally made by the members periodically, so as to continue to have the benefit conferred by the Association of having the use of their representative or agent even during their absence. There cannot be the least doubt that this is a very substantial benefit to those members who found is worth their while to engage the services of Authorized Assistants. A member it not obliged, as indicated above, to have such an Assistant, but the fact that he chooses to have such an Assistant on payment of the prescribed fee or subscription, itself, is proof positive that a businessman, who ordinarily thinks in terms of money, has found it worthwhile to have the services of an Assistant by making an additional payment to the Association by way of recompense for the benefit, thus, conferred upon him. . . . . .

Lastly, the sum of Rs. 16,000 represents fees received from members for allowing their application for enlisting the names of Companies not already on the Quotations List, so that the shares and stocks of these Companies, may be placed on the Stock Market. As already indicated, it is not the Company concerned which has directly to pay this fee, but the fee has to be paid by the members who initiates the proposal and, apparently, finds it worth his while to pay the prescribed fee to the Association. He would not make the payment unless he found it worth his while to do so. Apparently, such a member is interested in placing the stocks of that Company on the market. It cannot, therefore, be denied that that sum of money is definitely related to the specific services performed by the Association, namely, to permit transactions in respect of the shares of the Company concerned, which services would not otherwise be available to the members as a body or to the individual member or members interested in that Company.

In our opinion, therefore, each one of the three sources of income to the Association, accrues to it on account of its performing those specific services in accordance with its rules and by-laws. Each one of the three distinct sources of revenue to the Association, is specifically attributable to the distinct services performed by the Association for its members or such of them as avail themselves of those benefits And each one of those services is separately charged for, according to the rate or schedule laid down by the rules and by-laws of the Association. In our opinion, therefore, the requirements of sub-section (6) of section 10, have been fulfilled in the present case.

But we have yet to deal with the last argument accepted by the High Court with reference to the terms of sub-section (6) of section 10, namely, that the services contemplated therein, have reference to "matters outside the mutual dealings for which the Association was formed". In the first place, there is no warrant for limiting the application of the words used by the Legislature, in the way suggested. Secondly, the mutuality of the Association extends only to such benefits as accrue to every member on the payment made by him to the Association, but even if addi-

tional items of payment have to be made for additional services to be performed by the Association only for such of the members as avail themselves of those benefits, it cannot be said that the mutuality extends to those additional benefits also. It is, in our opinion, equally wrong to suggest that the services in question should have been outside the objects of the Association. If the Association renders services to such of its members as avail themselves of such services as are not within the scope of the business activities of the Association, those benefits, if any, would not be conferred by the Association as such, because the Association has to function within the scope of its objects of incorporation.

Hence, on a true construction of the provisions of the sub-section in question, we have come to the conclusion that the fact and circumstances of the present case, bring the three items of income of the Association within the taxing statute. In our opinion, the decision of the Bench of the Bombay High Court, consisting of Stone, C.J., and Kania, J., (as he then was), in the case of *Native Share & Stock Brokers' Association* v. *Commissioner of Income-Tax, Bombay*[1], is correct, and the facts of that case run very parallel to those of the case in hand, though there may be minor differences in the rules and by-laws for the Association then before the Bombay High Court. In that case, as in the present one, the rules of the Stock Brokers Association (the Bombay Sotock Exchange) contemplated a definite scheme for allowing members to employ authorized clerks and for the admission, conduct, control and supervision of those clerks, for the benefit primarily of the members who employed them. It was held by the High Court that the income received by the Association by way of fees in respect of those authorized clerks, was within the taxing statute and liable to income-tax. After examining in detail the provisions of the rules and the by-laws of the Association, Stone, C.J., made the following observations (at p. 633) which are equally applicable to the rules and by-laws of the Association in the present case :—

> " In my judgment these rules lay down a definite scheme and provide an organised arrangement, controlled and supervised by the Association for the benefit of its members. In my opinion the carrying of their scheme into effect is performing services for its members by the Association. No doubt the benefit of the scheme would redound to the benefit of all members since all would have the advantage of disciplined supervision exercised over the authorised clerks and remisiers of the others. I do not think that because the payment for the carrying of the scheme is provided for only by members who avail themselves of the use of the authorised clerks it makes any difference."

Kania, J., (as he then was), in a separate but concurring judgment, made the following very pertinent observations (at p. 634) :—

> " A perusal of the rules referred to in the judgment of the learned Chief Justice shows that the institution of authorised clerks exists for the benefits only of those who pay remuneration of Rs. 100 instead of going to the market and carrying on their business themselves. Individual members are permitted to work through an agent. For that the charge is made. The rules provide for the application and grant for such permission, registration of the authorised clerks on the individuals being recognised as clerks of particular members, supervision over the work of such clerks and particularly to prevent them from registering contracts either in their own name or in the name of another member ; and a general supervision over their good behaviour is contemplated. . . . . "
>
> A question was raised as to whether these are specific services to be performed for particular members or whether the rules amount to performance of duties towards members in general. It is true that several of the services to be rendered may be helpful to the other members for their business. Taken as a whole I consider that as a performance of services by the Association for the benefit of members who pay the remuneration."

We have made these copious quotations from the judgment of the Bombay High Court, because, in our opinion, they truly apply the provisions of sub-section (6) of section 10 to Associations like the one before us.

The other case to which our attention was drawn, is *Commissioner of Income-tax* v. *Chamber of Commerce, Alleppey*.[2] The facts of that case are not similar to those of the case before us, but the *ratio decidendi* of that case are relevant. That case referred to the Alleppey Chamber of Commerce. The Chamber inaugurated a produce section with the object of promoting the interests of merchants in general, and

1. (1946) 14 I.T.R. 628.
2. (1955) 27 I.T.R. 535.

of those engaged in the produce trade, in particular; of acting as arbitrators and collecting and publishing information relating to the produce trade. Members were admitted to the produce section on payment of admission fees, monthly fees and contributions at certain prescribed rates. The question which was referred to the High Court, was whether the receipts by way of fees and contributions, could be chargeable under section 10 (6) of the Act, and it was answered in the affirmative.

Though cases in England, by way of precedent for the decision of the case in hand, have not been cited at the Bar, apparently because the scheme of the Income-tax Law in England is different and the words of the statute are not in *pari materia*, yet there are some cases which throw some light on the controversy before us. For example, the case of *The Carlisle and Silloth Club* v. *Smith*[1], related to a Golf Club which was not incorporated. It was admittedly a *bona fide* members club, but under one of the terms of its lease, it had to admit non-members to play on its course on payment of "green fees" at certain prescribed rates. Those fees were paid non-members. Receipts from those fees were entered in the general accounts of the Club, thus, showing an annual excess of receipts over expenditure of the Club as a whole. It was held by Hamilton, J., (as he then was), that the Club carried on a concern or business in respect of which it received remuneration which was assessable to income-tax. He pointed out that the receipts from non-members went to augment the funds of the Club, and the revenue thus received was applied for the purposes of the Club towards its general expenditure. The case was taken up to the Court of Appeal, and the decision of that Court is reported in the same volume at page 198. The Court of Appeal affirmed the decision and dismissed the appeal.

The Judgment of the King's Bench Division in *The Liverpool Corn Trade Association, Limited* v. *Monks*[2], was based on facts which are similar to the facts, of the present case. In that case, the Liverpool Corn Trade Association, Limited, was an incorporated body under the Companies Act, with the object *inter alia*, of protecting the interests of the corn trade, and of providing a clearing house, a market, an exchange, and arbitration and other facilities to the trade. Membership of the Association was confined to persons engaged in the corn trade. Each member was required to have one share in the Company, and had to pay an entrance fee and an annua subscription. Non-members could also become subscribers. Payments were made to the Association by members and others for services rendered through the clearing house, etc. The assessee was taxed on the excess of its receipts over expenditure. On appeal to the Special Commissioners, they upheld the assessment. One of the points raised before the Special Commissioners, was that transactions with its members were mutual ones, and that any surplus arising from such transactions, was not a profit assessable to income-tax. On appeal, the High Court agreed with the determination of the Special Commissioners, and held that any profit arising from the Association's transactions with members, was assessable to income-tax as part of the profits of its business, and that the entrance fees and subscriptions received from members must be included in the computation of such profits.

It was suggested that the service in this case, if any, was extremely trivial and the remuneration which was large was for that reason not definitely related to the service. It was held by Upjohn, J., in *Bradbury* (*H. M. Inspector of Taxes*) v. *Arnold*[3], that the extent of the services was of no materiality. There, the question was being dealt with under Case VI of Schedule D of the Income-tax Act, 1918. The learned Judge observed:

"There is no doubt that a contract for services may, and clearly does, form a matter for assessment under Case VI of Schedule D, and not the less so that the services to be rendered are trivial or that they are to be rendered once and for all so that the remuneration may be regarded as a casual profit arising out of a single and isolated transaction."

The same view was expressed by Harman, J., in *Housden* (*Inspector of Taxes*) v. *Marshall*[4]. In that case, a well-known jockey contracted with a newspaper com-

1. (1912) 6 Tax Cas. 48.
2. (1926) 10 Tax Cas. 442.
3. (1957) 37 Tax Cas. 665, 669.
4. (1958) 3 All E.R. 639.

pany to make available to its nominee " reminiscences of his life and experiences on the turf for the purpose of writing a series of four articles ", and to provide photographs, press cuttings, etc. He was paid £750. The question was whether this amounted to sale of property, or was a payment for services rendered. It was held that it was the latter, and that it did not matter if the service rendered was trivial.

In view of what we have said above as to the nature of the service which the Association performed in respect of the Assistants, the payment of the fee was definitely related to that service. It is, therefore, plain that the case fell within section 10 (6) of that Act. It must, therefore, be held that the question referred to the High Court should have been answered in the affimative, and that the High Court was in error in giving its opinion to the contrary.

The appeal must, accordingly, be allowed with costs here and below.

Appeal allowed;
Reference answered in the affirmative.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, P. B. GAJENDRAGADKAR AND K. N. WANCHOO, JJ.

The Management of Ranipur Colliery under Messrs. Equitable Coal Co., Ltd. .. *Appellants**

v.

Bhuban Singh and others .. *Respondents.*

Industrial Disputes Act (XIV of 1947), sections 33 and 33-A—Nature of proceedings under section 33—Standing Orders of the employer—Period of suspension without pay limited to 10 days, 'pending enquiry'—Pendency of proceedings under section 33, if included in " pending enquiry ".

The Labour Appellate Tribunal while confirming the order granting permission under section 33 of the Industrial Disputes Act (XIV of 1947) allowed the appeal of the workmen against the order of dismissal of petition under section 33-A on the ground that there had been a breach of clause 27 of the Standing Orders and ordered the payment of wages from the date of suspension without pay to the date of order granting permission to dismiss less ten days allowed by that clause 27. Hence this appeal against the said order, was filed by the company under Special Leave of the Supreme Court.

The relevant facts are:—Seven workmen were served with charge-sheets on 1st April, 1955. Enquiry was properly held on 13th April, 1955 and they were found guilty of misconduct. Their dismissal was decided upon and application for permission under section 33 was also decided upon. Application was made on 29th April, 1955. The workmen were suspended on 4th May, 1955, without pay, pending orders of the Industrial Tribunal.

Clause 27 of the Standing Orders read: "An employee may be suspended . . . . provided suspension without pay, whether as a punishment or pending enquiry shall not exceed ten days ".

Held: As held in *The Automobile Products of India* v. *Rukmaji Bala*, (1955) 1 S.C.R. 1241: (1955) S.C.J. 253,: (1954) 1 M.L.J. 148 (S.C.), section 33 of Act (XIV of 1947) imposes a ban on the employer to dismiss a workman, in case some industrial dispute is pending between the employer and his employees, and it gives power to the Industrial Tribunal on application made to it, to grant or withhold permission to dismiss (*i.e.*) to lift the ban or to maintain the ban. The proceedings under section 33 are not an enquiry by the Tribunal into the rights or wrongs of the dismissal; they are not in the nature of an enquiry into the conduct of the employee by the Tribunal. (See *Lakshmi Devi Sugar Mills, Ltd.* v. *Pt. Ram Sarup*, (1956) S.C.R. 916 : (1957) S.C.J. 46). All that it has to see is whether a *prima facie* case has been made out for lifting the ban and whether a fair enquiry has been made by the employer in which he came to the conclusion *bona fide* that the employee was guilty of misconduct. The enquiry contemplated by clause 27 of the Standing Orders is an enquiry into the conduct of the employee. That enquiry can only be by the employer. " Pending enquiry " found in clause 27 can only refer to the enquiry by the employer into the conduct of the employee.

Standing Orders are concerned with employers and their employees and not with tribunals. Therefore enquiry mentioned in clause 27 can in the context refer to the enquiry by the employer and not to the proceeding under section 33 before the Tribunal.

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* Civil Appeal No. 768 of 1957. 21st April, 1959.

The scheme and object of section 33 also show that this conclusion in reasonable. But for the ban imposed by that section the employer would be entitled to dismiss the employee immediately after the completion of the enquiry on coming to the conclusion that he was guilty of misconduct meriting dismissal. To expect him to continue paying that employee is unfair. In such a case the suspension of the employee without pay would be justified. If it were not so he would have to go on paying the employee for not doing any work and the period for which this will go on will depend on the accidental circumstance how long the Tribunal takes to conclude the proceeding under section 33.

The words "pending enquiry" in clause 27 both in the context and in justice and reason refer only to the enquiry by the employer and not to the proceedings before the Tribunal under section 33.

In the instant case the suspension without pay was ordered after application for permission to dismiss was made to the Tribunal. As the permission was granted by the Tribunal and the Appellate Tribunal has upheld it there is no question of the employees being paid during the period of suspension without pay.

Appeal by Special Leave from the Judgment and Order, dated the 21st September, 1956, of the Labour Appellate Tribunal of India at Calcutta, in Appeal No. Cal. 101 of 1956.

M. C. Setalvad, Attorney-General for India (*S. N. Mukherjee* and *B. N. Ghosh*, Advocates, with him), for Appellants.

Dipak Dutta Choudhri, Advocate, for Respondents.

The Judgment of the Court was delivered by

Wanchoo, J.—This is an appeal by special leave against the decision of the Labour Appellate Tribunal of India in an industrial matter. The appellant is the Ranipur Colliery (hereinafter called the company) which carries on the business of coal mining in Dishergarh (West Bengal). The respondents are six workmen employed by the company. They along with another person were working at tub-checkers. It was found that they were making false reports both as to quality and quantity of coal, which it was their duty to check, with the result that the company suffered loss. Consequently, the company served charge-sheets on them and a regular enquiry was held on April 13, 1955, at which they were present and had full opportunity to give their explanation, cross-examine witnesses and generally contest the charge. The company came to the conclusion after the enquiry that the workmen were guilty of the misconduct with which they were charged and should be dismissed. As, however, an industrial dispute between the company and its workmen was pending before the Industrial Tribunal, the company applied under section 33 of the Industrial Disputes Act (hereinafter called the Act) for permission to dismiss the workmen. It appears that five out of seven workmen filed two applications under section 33-A of the Act before the Industrial Tribunal on the ground that they had been suspended without pay from May 4, 1955, and that this was against the provision of the Standing Orders governing their conditions of service. These three applications were heard together by the Industrial Tribunal, which came to the conclusion that the permission should be granted to the company to dismiss the seven workmen and accordingly did so. Having granted this permission, the Industrial Tribunal, in consequence, dismissed the applications under section 33-A.

Six of the workmen then went up in appeal to the Labour Appellate Tribunal against the grant of permission to dismiss and the dismissal of their applications under section 33-A. Their case was (i) that no permission to dismiss should have been granted, and (ii) that five of them had been placed under suspension without wages for an indefinite period in violation of the express provision of the Standing Orders and therefore they were entitled to relief. The Appellate Tribunal dismissed the appeal with respect to the grant of permission to dismiss. It, however, came to the conclusion that there was a breach of clause 27 of the Standing Orders, and therefore allowed the appeal of five workmen (other than Akhey Roy), who had applied under section 33-A and ordered that they should be paid their wages from the date of suspension without pay to the date of the Industrial Tribunal's order, less ten days as provided in clause 27 of the Standing Orders. Thereupon the company applied to this Court for special leave which was granted; and that is how the matter has come before us.

It appears that Akhey Roy has been unnecessarily joined as a respondent, for the order of the Appellate Tribunal does not show that any relief was granted to him and his appeal to the Appellate Tribunal must therefore be taken to have been dismissed.

Thus the only point that falls for consideration is whether suspension without pay pending permission of the Industrial Tribunal under section 33 of the Act is a breach of clause 27 of the Standing Orders. The brief facts necessary in this connection are these: Seven workmen were served with charge-sheets on April 1, 1955. After their replies had been received, an enquiry was held on April 13, 1955 and they were found guilty of misconduct. It was decided thereupon to apply for permission for their dismissal under section 33 of the Act. The application was made to the Tribunal on April 29, 1955. Thereafter the workmen were suspended on May 4, 1955, without pay pending orders of the Industrial Tribunal.

Clause 27 of the Standing Orders, on which reliance has been placed, reads thus—

"An employee may be suspended, fined or dismissed without notice or any compensation in lieu of notice if he is found to be guilty of misconduct, provided suspension without pay, whether as a punishment or pending enquiry, shall not exceed ten days."

The contention on behalf of the workmen is that the words "pending enquiry" appearing in clause 27 include enquiry under section 33 of the Act before the Industrial Tribunal also. Therefore, if the Industrial Tribunal takes longer than ten days to decide the application under section 33 and the workmen is suspended without pay, there would be a breach of clause 27 of the Standing Orders after ten days are over. On the other hand, it is contended on behalf of the company that the words "pending enquiry" in clause 27 refer only to the enquiry by the employer and not to the proceedings before the Industrial Tribunal under section 33. The Appellate Tribunal has come to the conclusion that the words "pending enquiry" in clause 27 include proceedings before the Industrial Tribunal under section 33 and therefore if suspension without pay is for more than ten days, even though it may be pending orders of the Industrial Tribunal under section 33, there is a breach of clause 27 of the Standing Orders. In this connection it has relied on an earlier decision of its own in *Rampalat Chamar and others* v. *The Assam Oil Co., Ltd.*[1], where the words were "pending full enquiry". It was of opinion that there was no difference between "pending enquiry" and "pending full enquiry" and that the proceedings before the Industrial Tribunal under section 33 are also included in these words.

We agree that there is no real difference between "pending enquiry" which appears in clause 27 of the Standing Orders and "pending full enquiry" which appeared in the Standing Orders in *The Assam Oil Company case*[1]. But we are of opinion that the view taken by the Labour Appellate Tribunal both in *The Assam Oil Company case*[1], and in this case is incorrect. This Court has held in *The Automobile Products of India, Ltd.* v. *Rukmaji Bala*[2], that section 33 imposes a ban on the employer to dismiss a workman and it gives power to the Industrial Tribunal, on an application made to it, to grant or withhold the permission to dismiss, *i.e.*, to lift or maintain the ban. So far, however, as the employer is concerned, this enquiry is (or, at any rate, should be) over when he comes to the finding that the case against the employee is proved and that the punishment of dismissal is the proper punishment. It is only then that the employer applies under section 33 for permission to dismiss the employee. Further, the proceedings under section 33 are not an enquiry by the Industrial Tribunal into the rights or wrongs of the dismissal; all that it has to see is whether a *prima facie* case has been made out or not for lifting the ban imposed by the section and whether a fair enquiry has been made by the employer in which he came to the *bona fide* conclusion that the employee was guilty of misconduct. Once it found these conditions in favour of the employer, it was

1. (1954) L.A.C. 78.
2. (1955) S.C.J. 253 : (1955) 1 M.L.J. (S.C.) 148 : (1955) 1 S.C.R. 1241.

bound to grant the permission sought for by him. It is thus clear that proceedings under section 33 are not in the nature of an enquiry into the conduct of the employee by the Industrial Tribunal; (see *Lakshmi Devi Sugar Mills, Ltd.* v. *Pt. Ram Sarup*[1]). The proceedings therefore before the Industrial Tribunal cannot be called an enquiry into the conduct of the employee. On the other hand, the enquiry which is contemplated by clause 27 is an enquiry into the conduct of the employee. That enquiry could only be by the employer. Therefore, when clause 27 uses the words "pending enquiry", those words can only refer to the enquiry by the employer into the conduct of the employee. It is in our opinion, entirely unnecessary that the words "pending enquiry" should have been qualified by the words "by the employer", before they can be interpreted as referring to the enquiry by the employer. Standing Orders are concerned with employers and employees and not with tribunals. Therefore, when an enquiry is mentioned in clause 27 it can in the context only refer to the enquiry by the employer and not to a proceeding under section 33 before the tribunal. We are therefore of opinion that in the context in which these words have been used in clause 27 they mean an enquiry by the employer and are not referable to the proceedings under section 33 of the Act before the Tribunal.

The scheme and object of section 33 also show that this conclusion is reasonable. Section 33 of the Act, as already stated, imposes a ban on the employer, thus preventing him from dismissing an employee till the permission of the tribunal is obtained. But for this ban the employer would have been entitled to dismiss the employee immediately after the completion of his enquiry on coming to the conclusion that the employee was guilty of misconduct. Thus if section 33 had not been there, the contract of service with the employee would have come to an end by the dismissal immediately after the conclusion of the enquiry and the employee would not have been entitled to any further wages. But section 33 steps in and stops the employer from dismissing the employee immediately on the conclusion of his enquiry and compels him to seek permission of the Tribunal, in case some industrial dispute is pending between the employer and his employees. It stands to reason therefore that so far as the employer is concerned he has done all that he could do in order to bring the contract of service to an end. To expect him to continue paying the employee after he had come to the conclusion that the employee was guilty of misconduct and should be dismissed, is, in our opinion unfair, simply because of the accidental circumstance that an industrial dispute being pending he has to apply to the tribunal for permission. It seems to us therefore that in such a case the employer would be justified in suspending the employee without pay after he has made up his mind on a proper enquiry to dismiss him and to apply to the tribunal for that purpose. If this were not so, he would have to go on paying the employee for not doing any work, and the period for which this will go on will depend upon an accidental circumstance, *viz.*, how long the tribunal takes in concluding the proceedings under section 33. In the present case the application for permission was made on April 29, 1955 and the Tribunal's award was given on March 10, 1956, more than ten months later. So if the view, taken by the Appellate Tribunal is correct, the employer has to pay the employee for this period of more than ten months, even though the employer had completed his enquiry and made up his mind to dismiss the employee long before and would have done so but for the ban imposed by section 33. The purpose of providing ten days as the maximum period of suspension without pay pending enquiry in clause 27 obviously is that the employer should not abuse the provision of suspension pending enquiry and delay the enquiry inordinately, thus keeping the employee hanging about without pay for a long period. The object further seems to be to see that the employer finishes his enquiry promptly within ten days if the suspension of the employee is without pay. But it could not have been intended that the Industrial Tribunal should also conclude the proceedings under section 33 within ten days, and if that was not done there would be a breach of clause 27. In any case the time taken by the proceedings

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1. (1956) S.C.R. 916 : (1957) S.C.J. 46.

before the tribunal under section 33 is beyond the control of the employer and as the provisions of clause 27 would be inappropriate and inapplicable to the said proceedings. We are therefore of opinion that the words " pending enquiry " in clause 27 both in the context and in justice and reason refer only to the enquiry by the employer and not to the proceedings before the tribunal under section 33.

This interpretation would not cause any serious hardship to the employee, for if the tribunal grants permission to the employer to dismiss the employee he will not get anything from the date of his suspension without pay ; on the other hand, if the tribunal refuses to grant the permission sought for, he would be entitled to his back wages from the date of his suspension without pay. We may in this connection refer to the case of *Lakshmi Devi Sugar Mills, Ltd.*,[1] where a similar point arose for decision. In that case the Standing Orders provided suspension without pay only for four days. It was there held that s spen ion without pay pending enquiry as also pending permission of the tribunal could not be considered a punishment, as such suspension without pay would only be an interim measure and would last only till the application for permission to punish the workman was made and the tribunal had passed orders thereon. It was also held that if the permission was accorded the workman would not be entitled to payment during the period of suspension but if the permission was refused he would have to be paid for the whole period of suspension. The principle laid down in that case applies to this case also. We would only like to add that th .t principle will apply only to those cases where there is a ban under section 33 and the employer has to apply under that section for lifting the ban after completing the enquiry. The matter will be different if there is no question of applying under section 33 and under the relevant Standing Orders the employer is competent to dismiss the employee immediately after his enquiry is complete. In such a case if the Standing Orders provide that suspension without pay will not be for more than a certain number of days, the enqui y must either be completed within that period or if it goes beyond that period and suspension for any reason is considered necessary, pay cannot be withheld for more than the period prescribed under the Standing Orders. In the present case, the suspension without pay took place even after the application under section 33 had been made and was pending permission under that section. As the Industrial Tribunal has accorded permission to dismiss the employees in this case and as that part of the award has been upheld by the Appellate Tribunal, there is no question of the employees being paid during the period of suspension without pay. We, therefor :, allow the appeal, set aside the order of the Labour Appellate Tribunal and restore the order of the Industrial Tribunal dismissing the two applications under section 33-A. In the circumstances, we pass no order as to costs.

G.R./K.S. *Appeal allowed.*

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. J. IMAM, A. K. SARKAR AND K. SUBBA RAO, JJ.

Messrs. Raman & Raman, Ltd. .. *Appellant**

v.

The State of Madras and others .. *Respondents.*

Motor Vehicles Act (IV of 1939) *as amended by the Madras Act (XX of* 1948), *section* 43-A—*Interpretation—Orders and directions under—If laws—Central Road Traffic Board deciding appeal applying the new orders in force—Propriety—Decision if subject to writ of* certiorari.

The Regional Transport Authority, Tanjore, applying the principles set forth under section 47 of the Motor Vehicles Act (IV of 1939) and the Rules, as also the G.O. No. 3353 issued under section

1. (1956) S.C.R. 916: (1957) S.C.J. 46.

* C.A. No. 37 of 1958. 18th February, 1959.

43-A then in force granted a permit on 19th February, 1955, to the appellant in preferance to the 4th respondent and the other applicants ; the Appellate Authority (Central Road Traffic Board) on appeal preferred the 4th respondent and granted the permit to him. The aggrieved appellant filed a petition, for a writ of *certiorari* and for quashing the order of the Board in the High Court of Madras which was granted ; but on Letters Patent appeal it was reversed and the petition under Article 226 of the Constitution was dismissed. Hence this appeal by Special Leave to the Supreme Court wherein it was contended that the appellate authority took notice of the G.O. Ms. No. 1689, dated June 15, 1955, in deciding the appeal and therefore it was an error on the face of the record subject to a writ of *certiorari.*

Held (Per *Subba Rao, J.*, *Imam, J.*, agreeing) :—The Orders and directions issued by the State Government under section 43-A of the Motor Vehicles Act (IV of 1939) as amended by Madras Act (XX of 1948) cannot be said to be ' laws '. The words used in that section 43-A (introduced by the Madras Act) are very wide. Divorced from the context and the setting in which it appears it may comprehend any orders or directions of a general character in respect of Road Transport ; if so construed it would not only subvert the other provisions of the Act but would also be vulnerable to attack on the ground of constitutional invalidity. All the salutary precautions provided under section 133 can be ignored if the directions given under section 43-A are given the status of law ; on the other hand if a restrictive interpretation is given, as it should be in the context, there would be a happy correlation of the functions of the various bodies under the Act including the Government. Chapter IV and the Rules made thereunder confer administrative powers on the Regional and the State authorities. Section 43-A enables the State Government to make orders and issue directions of a general character in respect of those functions to implement the provisions of the Act and the Rules made thereunder ; and the said authorities shall give effect to them all. The context in which and the setting wherein the section is inserted (Chapter IV after section 43) as also the terms thereof (' orders ' and 'directions ') lend support to the said conclusion.

C. S. S. Motor Service v. *State of Madras*, (1948) 1 M.L.J. 85, referred to.

The contention of the respondents that the two G.Os. Nos. 3353 of 1954 and 1689 of 1955 are not materially different and on the application of either the order appealed from can be sustained cannot be accepted. On the strict consideration of the former G.O. the 4th respondent would not be entitled to the permit.

But as the said order is not a 'law' but an administrative direction it could not affect the validity of the order of the Appellate Authority, if it made the order, having regard to the considerations laid down in section 47 of the Act, the main consideration being the interest of the public generally. As to the advantages to the public of granting permits to a fleet owner or new entrants who enters into competition two views are possible. If the Central Road Traffic Board (the Appellate Authority) preferred the one to the other it was well within its rights in holding that the public interest would be best served, by avoiding monopoly, if the permit was given to the 4th respondent in the circumstances of the case.

In short, the appellant had a fundamental right to carry on the motor transport business subject to reasonable restrictions imposed by law. Some of the provisions of Chapter IV contain such reasonable restrictions. The orders issued under section 43-A could cover only the administrative field of the officers concerned and so any directions issued was not ' law regulating the rights of parties ' (applicants for permit) and cannot obviously add to the considerations prescribed under section 47 for the grant or refusal of the permit as the case may be. There was therefore no change in the ' law ' pending the appeal so as to affect the appellant's rights. In this view the appellant cannot question the order of the Board on the ground that it decided the appeal on a law made subsequent to the issue of the permit to him.

Per *Sarkar, J.*—The Central Road Traffic Board is clearly a quasi-judicial authority ; it is also a principle firmly established and accepted by the Supreme Court that a writ of *certiorari* can issue where the decision of a tribunal discloses an error of law apparent on its face. If it was an error for the Board to have followed G.O. Ms. No. 1037 (which is the effect of G.O. Ms. No. 1689 of 1955) such error appeared on the face of its order ; for it expressly purported to be guided by that G.O. Therefore the only question is whether this was an error and an apparent error.

It is far from clear that a qausi-judicial tribunal (Central Road Traffic Board in this case) is not entitled, in hearing an appeal from another such tribunal (Regional Transport Authority here) to apply a rule which has come into existence since the decision under appeal. That being so there is no error on the face of the record.

It cannot be overlooked that the tribunal is not enforcing a vested right which one party has against another or others. It is for the reason that a Court gives effect at the trial on an appeal to the substantive rights of the parties existing on the date of the writ that a change in law cannot be taken into account in appeals. It is not the appellant's contention that when a person makes an application

for a permit acquires a right to have it decided by the orders in force at that time but only the authority has to consider the applications according to the orders in force at the hearing thereof. Therefore the basis of the contention that the Appellate Authority cannot consider a G.O. issued since the decision appealed from completely disappears. Nor is it possible to conceive the decision of the Regional Transport Authority granting or refusing to grant a permit as having any operation by way of *res judicata*. Thus there is no warrant for applying the general rule applicable to Courts of law hearing an appeal from a subordinate Court to tribunals as are concerned in the instant case.

Further the latter G.O. was directed only to the Central Road Traffic Board which heard the appeals and this would indicate that the order is to be applied to pending appeals and it was meant to be retrospective so far. Then there is another reason for saying that it not clear that the Board was in error in applying it.

For these reasons the appeal fails.

Obiter.—The contention that orders under section 43-A are merely administrative orders which are not laws and any error with regard to them would not be an error of law liable to correction by a writ of *certiorari* cannot be assented to. The whole justification for the issue of such a writ is to prevent where no other remedy is available, a patent injustice being allowed to stand.

Appeal by Special Leave from the Judgment and Order, dated the 14th September, 1956, of the Madras High Court in Writ Appeal No. 64 of 1956, arising out of the Judgment and Order, dated the 1st May, 1956, of the said High Court in Writ Petition No. 852 of 1955.

G. S. Pathak, Senior Advocate (*R. Ganapathy Iyer*, Advocate and *G. Gopalakrishnan*, Advocate of *M/s. Gagrat & Co.*, with him), for Appellant.

A. V. Viswanatha Sastri, Senior Advocate (*J. B. Dadachanji* and *S. N. Andley* Advocates of *M/s. Rajinder Narain & Co.*, with him), for Respondent No. 4.

The Court delivered the following Judgments :

Subba Rao, J.—(On behalf of *Imam, J.*, and himself). This appeal by Special Leave against the judgment of the High Court of Judicature at Madras raises the question of interpretation of section 43-A of the Motor Vehicles Act, 1939 (IV of 1939), as amended by the Motor Vehicles (Madras Amendment) Act, 1948 (Mad. XX of 1948), hereinafter referred to as the Act. On February 19, 1955, the Regional Transport Authority, Tanjore, Madras State, the second respondent herein, called for applications under section 57 (2) of the Act for grant of a stage carriage permit on the Saliamangalam—Kodavasal route. The appellant and the fourth respondent K. M. Shanmugam, Proprietor, K. M. S. Transport, Ammapet, Tanjore District, along with others, applied for the grant of the said permit. The Regional Transport Authority at its meeting held on April 19, 1955, after hearing the representations of the applicants, granted the permit to the appellant. The fourth respondent and two others preferred appeals against the said order to the Central Road Traffic Board, Madras, the third respondent herein. The Central Road Traffic Board by its order, dated June 25, 1955, set aside the order of the Regional Transport Authority and granted the permit to the fourth respondent. The appellant preferred a Revision Petition against that order to the first respondent, the State of Madras, but the first respondent rejected the petition by its order, dated October 14, 1955. Thereafter, the appellant filed a Writ Petition (No. 852 of 1955) in the High Court of Madras under Article 226 of the Constitution to quash the orders of the Central Road Traffic Board and the State of Madras. Rajagopalan, J., of the said High Court by his order, dated May 1, 1956, quashed the order of the Government and directed the State Transport Appellate Tribunal which had been constituted in place of the Central Road Traffic Board to dispose of the appeal in accordance with law. Against the judgment of the learned Judge, the fourth respondent preferred an appeal under the Letters Patent and the appellate Bench of that High Court, consisting of Rajamannar, C.J., and Ramaswami, J., set aside the order of Raja-

gopalan, J. and restored the order of the Central Road Traffic Board. The appellant with Special Leave filed the present appeal against that judgment of the High Court.

Mr. Pathak, appearing for the appellant, raised before us the following two points : (i) The appeal filed by the fourth respondent against the order of the Regional Transport Authority to the Central Road Traffic Board was barred by limitation and the Board acted illegally in disposing of the appeal without deciding the question of limitation ; and (ii) the appellant had the fundamental right to carry on the business of transport subject to reasonable restrictions imposed by law as on the date he applied for a permit or at any rate when the Regional Transport Authority issued the permit to him, and that the Central Road Traffic Board committed an error, evident on the face of the record, in disposing of the appeal in accordance with the new restrictions imposed by law made pending the appeal before it. Stated as a legal proposition, the contention is that the appellant had acquired a vested right to carry on the business of transport and that the same could not be defeated by a subsequent law made pending the appeal, which was only prospective in character.

The first argument need not detain us, for the learned counsel, in view of the finding of the High Court that as a matter of fact the appeal to the Central Road Traffic Board was not barred, fairly did not press it before us. This leaves us with the second and the only argument in the case. To appreciate the contention it is necessary to set out some more relevant facts : On March 28, 1953, the Government made an order, G.O. Ms. No. 1037, Home, purporting to be under section 43-A of the Act. The material part of that order reads :

"(1) That additional buses should not be permitted to ply on existing routes unless there is a clear need for increase in the number of buses plying on a particular route and wasteful competition should be discouraged but healthy competition where there is room should be encouraged and

(2) that the transport authorities while granting stage carriage permits should work up to the minimum of 5 permits with a spare bus for each operator and the issue of permits should be so regulated as not to encourage benamidars on one hand and inefficient operators on the other."

On November 15, 1954, in supersession of paragraph 2 of the above order, the Government issued an order, G.O. Ms. No. 3353, Home, to the following effect :

"The Governor of Madras hereby directs that each viable stage carriage unit in this State shall consist of not less than 10 buses and that in the matter of grant of stage carriage permits, other things being equal, and with a view to build up such viable units, the following shall be the order of preference :

(1) Operators with less than 10 busses but nearer the mark of 10.

(2) Operators with 10 and more buses.

(3) Others including new entrants.

The Governor also directs that in order to facilitate the amalgamation of existing small units into viable units transfer of permits shall be allowed liberally."

On June 15, 1955, the Government issued another order, G.O. Ms. No. 1689, Home, whereby the Central Road Traffic Board was informed that pending further orders of Government after re-examination of the question of formation of viable units of stage carriages, the orders in para. (2) of G.O.Ms. No. 1037, Home, dated 28th March, 1953, would be in force. The effect of this order was that the first order was restored pending final orders.

When the Regional Transport Authority issued the permit in favour of the appellant, G.O. Ms. No. 3353, Home, dated 15th November, 1954, was in force, and when the Central Road Traffic Board made the order giving the permit to the 4th respondent, G.O.Ms. No. 1689, Home, dated 15th June, 1955, was in operation. Apart from other considerations, the Regional Transport Authority relied upon the former G.O. in preferring the appellant to other applicants, while the Central

Road Traffic Board referred to G.O.Ms. No. 1037, Home, dated 28th March, 1953, which was restored by the later G.O. in preferring the fourth respondent to the appellant. We shall give further details of the orders of the Regional Transport Authority and the Appellate Tribunal in the context of another argument, but, for the present, the aforesaid facts would suffice.

It would be convenient at this stage, before entering into the controversial question, to state briefly some of the well-established principles relevant to the question raised: (i) A citizen has a fundamental right to ply motor vehicles on public pathways under Article 19 (1) (*g*) of the Constitution, and any infringement of that right by the State can be justified only if it falls within the scope of Article 19 (6) thereof—See *C. S. S. Motor Service, Tenkasi* v. *The State of Madras*[1] and *Saghir Ahmad* v. *The State of U.P.*[2]; (ii) proceedings before tribunals issuing permits are quasi-judicial in character—See *C. S. S. Motor Service, Tenkasi* v. *The State of Madras*[1] and *New Prakash Transport Co., Ltd.* v. *New Swarna Transport Co., Ltd.*[3] ; (iii) a new law which takes away or impairs vested rights acquired under existing laws must be deemed to be intended not to have retrospective operation, unless such law makes it retrospective expressly or by implication—*See* Maxwell on the Interpretation of Statutes, page 215 ; *Garikapatti Veeraya* v. *N. Subbiah Chowdhury*[4] and *Gulab Chand* v. *Kudilal*[5] ; and (iv) the same principle applies to a law made pending an appeal before an appellate Court—See *R. M. Seshadri* v. *Province of Madras*[6]. So much is not, and cannot, be disputed. We shall assume that the said principles apply to a law made pending an appeal against an order of a quasi-judicial tribunal. The main controversy centres round the fact whether the orders made and the directions issued by the State Government under section 43-A of the Act are "laws" as to attract the operation of the aforesaid principles. While Mr. Pathak says that the said directions are as much laws as those of the provisions of a statute or rules made thereunder, Mr. A. V. Viswanatha Sastri contends that, having regard to the scheme of the Motor Vehicles Act and the different sections of the Act vesting powers in the State Government with regard to different matters dealt with by the Act, the power conferred on the State Government under section 43-A is a power to make orders or issue directions in respect of administrative matters regulating the relationship between the State Government and the Transport Authorities and that such orders do not affect the legality or the validity of judicial acts of the said authorities. To appreciate the rival contentions, it is necessary to consider the relevant provisions of the Act.

The Act, which is a Central Act, was passed in the year 1939 and subsequently it was amended from time to time both by Parliament and also by the local legislatures. The main object of the Act is to regulate the motor traffic in every State in the interest of the public. Chapter II contains provisions relating to licensing of drivers of motor vehicles. Chapter III prescribes for the registration of motor vehicles. Chapter IV provides for the control of transport vehicles. Chapter V lays down the general provisions regarding construction, equipment and maintenance of motor vehicles. Chapter VI regulates the control of traffic. Chapter VIII deals with the insurance of motor vehicles against third party risks. Chapter IX defines the offences, lays down the penalties and prescribes the procedure for detecting offences and enforcing penalties. Chapter X deals with miscellaneous matters. Every Chapter contains a specific provision conferring a power on the State Government to make rules for the purpose of carrying into effect the provisions of that Chapter. To carry out the objects of the Act, the State Government is authorized to create a hierarchy of officers such as the State Transport Authority, the Regional Transport Authority, the Registering Authority, etc. Such Authorities are entrusted with

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1. (1952) 2 M.L.J. 894 : I.L.R. (1953) Mad. 304, 330, 334.
2. (1954) S.C.J. 819 : (1955) 1 S.C.R. 707, 719.
3. (1957) M.L.J. (Crl.) 157 : (1957) S.C.J. 236 : 1957 S.C.R. 98, 118.
4. (1957) 2 M.L.J. (S.C.) 1 : (1957) 2 An. W.R. (S.C.) 1 : (1957) S.C.J. 439 : (1957) S.C.R. 488, 515 (S.C.).
5. (1959) S.C.J. 173 : A.I.R. 1958 S.C. 554, 558.
6. (1954) 1 M.L.J. 206 : I.L.R. (1954) Mad. 643 : A.I.R. 1954 Mad. 543.

administrative as well as quasi-judicial functions. Chapter IV with which we are now concerned follows the same pattern. Its general heading is "control of Transport Vehicles". Section 42 prohibits the owners of transport vehicles from using them in any public place without permits. Section 43 empowers the State Government to control road transport. Section 44 enables the State Government to constitute Transport Authorities to exercise and discharge the specified powers and functions. Under section 44 (4) the State Transport Authority is authorised to issue directions to any Regional Transport Authority and the latter shall be guided by such directions. Sections 46, 47, 48, 57, 60 and 64 prescribe the procedure for issue of permits and also create a hierarchy of Tribunals for hearing of applications and disposal of appeals. The said procedure is clearly quasi-judicial in character and has been held to be so by this Court. Sections 67 and 68 confer a power on the State Government to make rules to regulate the operation of transport carriages and also to make rules for the purpose of carrying into effect the provisions of this Chapter.

Under the aforesaid provisions and the rules made thereunder, the State Transport Authority is made the administrative head of all the other Transport Authorities functioning in the State, and the Central Road Traffic Board the Appellate Authority in the hierarchy of Tribunals constituted under the Act. As the administrative head the State Transport Authority is authorized under section 44 (4) of the Act to issue directions to any Regional Transport Authority, who shall be guided by such directions. As an appellate tribunal the Central Road Traffic Board is empowered to dispose of the appeals preferred against the orders made by the subordinate authorities under the Act in respect of specified matters. But the Central Act did not make any provision enabling the State Governments to control either the quasi-judicial or the administrative wings of the machinery provided under the Act. While the State Transport Authority could issue directions to other Transport Authorities constituted under the Act, a State Government could not likewise issue any directions either to the State Transport Authority or to its subordinate authorities. So too, while the Central Road Traffic Board could in its appellate jurisdiction set aside or modify the orders of the subordinate tribunals, the State Government was not in a position to set aside the improper orders of the tribunals under the Act. Presumably, therefore, to bring the said authorities under its control, both on the judicial and the administrative wings, Motor Vehicles (Madras Amendment) Act, 1948 (Madras XX of 1948), was passed and it became law on December 21, 1948. Among other amendments, sections 43-A and 64-A were inserted in the Act. Section 43-A reads :

> "The State Government may issue such orders and directions of a general character as it may consider necessary, in respect of any matter relating to road transport, to the State Transport Authority or a Regional Transport Authority ; and such Transport Authority shall give effect to all such orders and directions."

Section 64-A is to the following effect :

> "The State Government may, on its own motion or on application made to it, call for the records, of any order passed or proceeding taken under this Chapter by any authority or officer subordinate to it, for the purpose of satisfying itself as to the legality, regularity or propriety of such order or proceeding and after examining such records, may pass such orders in reference thereto as it thinks fit."

So far as section 64-A is concerned, in express terms it confers a judicial power on the State Government to keep a subordinate judicial tribunal within bounds. Section 64-A along with sections 45 to 57, 60 and 64, forms a complete code in respect of the quasi-judicial disposals of the issue of permits. The permits should be issued in accordance with the provisions of the Act and the rules framed thereunder following the judicial procedure. The words used in section 43-A are very wide. It says that the State Government may issue orders and directions of a general character in respect of any matters relating to road transport. Divorced from the context and the setting in which the new section appears, it may comprehend any orders or directions of a general character in respect of road transport ; and, if so construed, it would not

only subvert the other provisions of the Act but also would be vulnerable to attack on the ground of constitutional invalidity. It would entrust the Government with a naked arbitrary power capable of being used to compel quasi-judicial tribunals to dispose of cases in a particular way; it would enable them to couch the order in a general way to induce a tribunal to come to a particular decision in a given case; and it would be destructive of the entire judicial procedure envisaged by the Act and the rules framed thereunder in the matter of disposal of specified questions. It would be attributing to the legislature an incongruity, for the State Government could issue directions in respect of which it could make rules ignoring the safeguards provided in the making of the rules. Section 133 lays down that every power to make rules given by the Act is subject to the condition of the rules being made after previous publication. It also enjoins on the Central and the State Governments to place the said rules for not less than fourteen days before the appropriate legislature and the rules so made shall be subject to such modification as the legislature may make in such session in which they are so laid. All these salutary precautions can be ignored if the directions given under section 43-A are given the status of law; on the other hand, if a restrictive meaning is given as it should be in the context, there would be a happy correlation of the functions of the various bodies under the Act, including the Government. The Government's legislative power is recognized under sections 67 and 68 of the Act; its judicial power is maintained under section 64-A and its administrative power is affirmed under section 43-A. Chapter IV and the rules made thereunder confer administrative powers on the Regional Transport Authorities and the State Transport Authority. Section 43-A enables the State Government to make orders and issue directions of a general character in respect of those functions to implement the provisions of the Act and the rules made thereunder; and the said authorities shall give effect to all such orders and directions.

The context in which and the setting wherein the section is inserted also lend support to the said conclusion. Section 42 describes the necessity for permits and section 43 confers specific powers on the Government to control road transport. Section 43-A coming thereafter and before the sections conferring quasi-judicial powers on tribunals is indicative of the fact that the jurisdiction conferred under section 43-A is confined to administrative functions of the Government and the tribunals rather than to their judicial functions; for, if the section was intended to confer legislative power, it should have found its place after section 64-A or somewhere near the end of the Chapter. Though it is not a conclusive test, the placing of the provisions of sections 43-A and 64-A, which were inserted by the same Amending Act is also a pointer to the intention of the legislature, namely, that section 43-A was intended to govern administrative functions of the tribunals.

The terms of the section and the manner of issuing orders and directions thereunder also support the same conclusion. The legislature used two words in the section; (i) order and (ii) directions Whenever it intended to affect the rights of parties, it used the word "rules", but in this section it designedly used the words appropriate to the control of administrative machinery. The words "directions and order" are defined in one of the Law Lexicons thus:

"Direction contains most of instruction io it; order most of authority. Directions should be followed; orders obeyed. It is necessary to direct those who are unable to act for themselves; it is necessary to order those whose business it is to execute the orders."

The said meaning of the words is more appropriate to administrative control rather than to rules of law affecting rights of parties. Further, the declaration in the section that the orders and the directions under the section shall be binding on the authorities concerned is indicative of the fact that they are not laws, for if they are laws, no such declaration is necessary. What is more, they need not even be published and may, if the Government so desires, take the form of secret communication to the authorities concerned. Nor is there any basis for the argument that as the directions are issued under a statutory power, they are "laws". The source of the power does not affect the character of the things done in exercise of that power. Whether it

is a law or an administrative direction depends upon the character or nature of the orders or directions authorized to be issued in exercise of the power conferred. That should be determined on other considerations adverted to by us already. Our view is in accord with that expressed by a Division Bench of the Madras High Court in *C. S. S. Motor Service, Tenkasi* v. *The State of Madras.*[1] There the constitutional validity of sections 42, 43-A, 47, 48 and 64-A of the Act was questioned. In dealing with section 43-A, Venkatarama Ayyar, J., who delivered the judgment of the Court, observed at page 335, thus :

" Coming next to section 43-A, it is argued that it confers on the Provincial Government wide edd unlimited powers to issue all such orders and directions of a general character as they may consider necessary, that the transport authorities are bound under that section to give effect to such orders and directions, that there is nothing to prevent the Government from even issuing directions with reference to the judicial functions which those authorities have to discharge under the Act, that it could not be exepected that such directions would be disregarded by those authorities and that in practice the provisions of section 47 could be evaded. Reference is also made to the fact that this section was introduced for nullifying the effect of the decision in *Sri Rama Vilas Service, Ltd.* v. *The Road Traffic Board, Madras*[2], where it was held that the transport authorities had failed in the discharge of their judicial function in meekly giving effect to an order of the Government which was opposed to the provisions of the Act. Section 43-A appears to be intended to clothe the Government with authority to issue directions of an administrative character and in that view it would be valid. No specific order or direction of the Government is attacked in these proceedings as invalid and the discussion is largely academic. The section must itself be held to be valid though particular orders passed thereunder might be open to challenge as unconstitutional."

From the aforesaid observations, it is manifest that the learned Judge construed section 43-A as conferring a power on the State Government to issue directions of an administrative character. If the construction was otherwise, the learned Judge would have held that the section was constitutionally bad as he had held in regard to other sections. The High Court of Andhra Pradesh in *Gopalakrishna Motor Transport Co., Ltd.* v. *Secretary, Regional Transport Authority, Krishna District, Vijayawada*[3], had also considered the scope of the provisions of section 43-A. There, the State Government issued an order under section 43-A of the Act prescribing the manner of checking a bus for over-loading. The procedure prescribed was not followed by the Regional Transport Authority, which was empowered to suspend the permit on the ground of over-loading under section 60 of the Act. One of the contentions raised was that as the mandatory direction given by the State Government under section 43-A was not followed, the Regional Transport Authority in exercising its powers under sectio n60 should have held that there was no over-loading. In rejecting this plea, the High Court observed at page 885 thus :

" Government has power to frame rules and also to issue administrative directions of a general character under section 43-A of the Act..................In so far as the order was couched in mandatory terms, it is incumbent upon the officers concerned to comply with it..................

Any instruction given under section 43-A cannot override the discretionary power conferred upon the Transport Authority under section 60..........We, therefore, hold that the order of the Government contained only administrative instructions issued under section 43-A. It is true that some of the administrative instructions impose a mandatory duty on the officers concerned and if they do not discharge their duty, Government may take disciplinary action against them. But, in our view, non-compliance with those directions cannot affect the finding the Authority arrived at on other material on the question of over-loading."

In the present case, the learned Chief Justice, who was a party to the decision in *C. S. S. Motor Service* v. *The State of Madras*[1], presumably on the basis of that judgment observed thus :

" In our opinion, these Government Orders, which are in the nature of general administrative directions to the transport authorities, do not vest any rights, indefeasible rights—in any applicant for a stage carriage permit."

The result of the discussion may be summarised thus : The appellant had a fundamental right to carry on his motor transport business subject to reasonable

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1. (1952) 2 M.L.J. 894: I.L.R. (1953) Mad. 304.
2. (1948) 1 M.L.J. 85.
3. (1957) M.L.J. (Crl.) 469 : (1957) 2 An. W.R. 196 : A.I.R. 1957 A.P. 882.

restrictions imposed upon that right by law. Some of the provisions of Chapter IV of the Act contain reasonable restrictions on the said right. He was given a permit on the basis of the law imposing the said restrictions on his right. The orders made and the directions issued under section 43-A could cover only the administrative field of the officers concerned and therefore any direction issued thereunder was not law regulating the rights of the parties. The order made and the directions issued under section 43-A of the Act cannot obviously add to the considerations prescribed under section 47 on the basis of which the tribunal is empowered to issue or refuse permit, as the case may be. There was, therefore, no change in the law pending the appeal so as to affect the appellant's vested right. In this view, the appellant cannot question the validity of the order of the Central Road Traffic Board on the ground that it decided the appeal on a law that was made subsequent to the issue of the permit to him.

The same result could be arrived at by different process of reasoning. The appellant had a fundamental right to carry on the business of motor transport subject to reasonable restrictions imposed by law under Article 19 (6) of the Constitution. The Act imposed reasonable restrictions on the said right. One such restriction was that the State Government may issue such orders and directions of a general character as it may consider necessary in respect of any matter relating to road transport to the State Transport Authority. When the appellant applied for a permit, he must be deemed to have had the knowledge of the fact that his application would be disposed of by the State Transport Authority in accordance with orders and directions of a general character issued by the State Government. The directions were not new law that came into existence pending the appeal, but only issued under a law that was in existence even at the time he applied for a permit. The law was that embodied in section 43-A of the Act, namely, that the Government could issue directions binding on the authorities concerned and that law was a pre-existing one and the application had to be disposed of subject to that law till it was finally terminated by an order of the highest tribunal in the hierarchy. In this view also there are no merits in the appellant's contention.

Now coming to the merits of the case, the contentions of the parties may be stated thus: The learned counsel for the respondents contends that there is no material difference between G.O. Ms. No. 1037 and G.O. Ms. No. 3353, except in regard to one circumstance, which is not material for the present purpose: while in the former G.O., the argument proceeds, the transport authority is directed to work up to a minimum of five units with a spare bus, under the latter G.O., the viable unit fixed is not less than ten buses and the authority concerned is directed to work up to that limit. It is pointed out that the only difference is in the measure of a viable unit and that the fourth respondent's case falls squarely within the first category in the order of preference prescribed in G.O. Ms. No. 3353 of 1954. The learned counsel for the appellant contends that the order of preference is based upon the achievement of the object, namely, building up of viable units of ten permits and that the appellant admittedly had only four permits and therefore, far below the viable unit and he could not be given preference in a competition between him and the appellant, who had more than thirty permits. The problem presented can only be solved by a reasonable interpretation of the plain words used in G.O. Ms. No. 3353 of 1954 read along with the expressed object sought to be achieved thereby. It will be convenient at this stage to read the said order omitting the unnecessary words:

"*G.O. Ms. No.* 3353, *Home, dated* 15*th November*, 1954. The Planning Commission has made the following recommendation in respect of Road Transport service:

'It is desirable for the existing private operators' units to amalgamate, wherever possible, into big viable units to enable them to achieve better returns and maintain better standards of operation.'

....

The Government considered that it will be in the interests of the public if road transport services are conducted by operators having at lesat ten stage carriages and they have therefore decided that each viable unit should consist of at least ten stage carriages.

In exercise of the powers conferred by section 43-A of the Motor Vehicles Act, 1939 (Central Act IV of 1939), and in supersession of the orders issued in paragraph (ii) of G.O. Ms. No. 1037, Home, dated 28th March, 1953, the Governor of Madras hereby directs that each viable stage carriage unit in this State shall consist of not less than 10 buses and that in the matter of grant of stage carriage permits, other things being equal, and that with a view to build up such viable units, the following shall be the order of preference :

1. Operators with less than 10 buses, but nearer the mark of ten.
2. Operators with 10 and more buses.
3. Others including new entrants.

The Governor also directs that in order to facilitate the amalgamation of existing small units into viable units transfer of permits shall be allowed liberally."

The G.O. was issued to achieve the object of inducing the operators to amalgamate wherever possible, into big viable units to enable them to achieve bet.er returns and maintain better standards of operation. The Government decided that a unit of at least ten buses would be necessary to achieve that object. To implement that policy, it directed that each viable stage carriage unit should consist of not less than ten buses and with a view to build up such viable units, it directed that, other things being equal, the order of preference contained therein should be followed. The order of preference contained three categories, one excluding the other. They did not provide for any rules of preference *inter se* of operators coming within each one of the categories. Presumably, that was left to be decided by the transport authorities having regard to the considerations mentioned in section 47. The argument of the learned counsel for the fourth respondent is based upon the first category, which reads :

"Operators with less than 10 buses but nearer the mark of 10 ".

He contends that, having regard to the object of the G.O., namely, to build up a viable stage carriage unit of ten, in the absence of an operator with stage carriages nearer to the mark of ten than the fourth respondent, he is entitled to a permit in preference to the appellant provided other things are equal between them. In respect of this argument, emphasis is laid upon the word "nearer" and it is said that the said word indicates a rule of preference between operators coming within that category, namely, that an operator like the fourth respondent is to be preferred, if there is no other operator nearer than him to the mark of ten. This argument is attractive, but, in our view, it is inconsistent with the scheme of the order. It is true that the phraseology of category (1) has not been happily worded and perhaps grammatically not correct. But the intention is fairly obvious. For one thing the rule of preference is based upon the achievement of the object, *i.e.*, the building up of a viable unit of ten permits, for the other, the rule of preference is only to govern the three categories mentioned therein and not *inter se* between those falling in each category. The word "others" in category (3) becomes meaningless, if operators far below the m rk of ten permits fall within the first category. The more reasonable interpretation and that is in accord with the intention of the State Government is that, other things being equal, in a competition between the three categories of perators mentioned in the order, operators nearer the mark of ten shall be preferred. In the absence of any such operator, operators with ten or more buses should be given the second preference. In the absence of such operators, others, *i.e.*, operators who are ot nearer the mark of ten and new entrants, will have to be preferred. This rule of preference was not expected to cause any injustice as the restriction on the transfer of permits was removed and the small operators were permitted to amalgamate the existing units into viable units. This policy did not achieve the expected results, but encouraged monopolies ; with the result that the Government had to cancel the order on June 15, 1955, within about six months from the making of it ; but that circumstance does not affect the construction of the clause. We, therefore, hold that on a strict interpretation of the G.O. Ms. No. 3353 of 1954, the fourth respondent would not have been entitled to the permit.

But as we have held that the said order was not law but was only an administrative direction, it could not affect the validity of the order of the Central Road Traffic

Board, if it made the order, having regard to the consideration laid down in section 47 of the Act. The main consideration under section 47 of the Act is that the Regional Transport Authority shall, in deciding whether to grant or refuse such carriage permit, have regard to the interest of the public generally. The Central Road Traffic Board, after having found that the appellant had other advantages such as he operated a three-route permit touching the route under appeal, that his record was satisfactory and that he was not inefficient, came to the conclusion that by giving the permit to the fourth respondent, it would be encouraging not only healthy competition but also would be enabling him to work out to the minimum of five permits. It is true that if the 1954 order should govern the selection, the main reason given by the Board would be wrong. Whether a small unit or a large unit would be viable or would be in the interest of the public is always a debatable point and it is possible to take conflicting views on the question. One view is that an operator who is described as fleetowner will have considerable experience in the business and will be in a position to keep a workshop and additional buses to meet any emergency and therefore he would be in a bet er position to operate the service without break and keep up the timings in the interest of the public than a stray bus operator. The alte native view is that encouragement of large viable units will tend to monopoly and the freedom from competition will bring about deterioration in service. On the other hand, new entrants and operators owning a few buses will have incentive to bestow greater attention to the public needs, particularly in view of the competition from others in the same field. That both views are possible is evident from the fact that the State Government has been changing its views so often on the subject; and indeed the cancellation of G.O. Ms. No. 3353 of 1954, within six months from the date of its issue, presumably on the basis of the experience gained during that period, is a clear indication that in the opinion of the Government, encouragement of large units was not in the interest of public. If that be so, one cannot say that the Central Road Traffic Board acted without jurisdiction when it accepted the view that the smaller units would be more in the interest of the public rather than larger units; nor the fact that it accepted the prevailing view of the Government on the subject would make it any the less an order within its jurisdiction, provided the said view was germane to one or other matters stated in section 47 of the Act. As pointed out by us, both the views are possible and the Board was well within its rights in holding that the public interest would be served if the permit was given to the fourth respondent, in the circumstances of the case.

In this view, no other question arises for consideration. The order of the Madras High Court is correct and the appeal is dismissed with costs.

Sarkar, J.—The appellant before us is a company operating public motor bus services in the State of Madras. Its grievance is that it has been wrongly refused a permit to run a bus.

Motor bus services transporting passengers on the public highways for consideration, called stage carriage services, are controlled by sections 42 to 68 contained in Chapter IV of the Motor Vehicles Act, 1939. The Act provides that no vehicle can be used as a stage carriage save in accordance with a permit granted by a Regional Transport Authority set up by the State Government. Se tion 47 of the Act lays down certain matters to which a Regional Transport Authority shall have regard in deciding whether to grant or refuse a stage carriage permit, one of which is the interest of the public generally. Section 68 of the Act authorises the State Government to make rules for the purpose of carrying into effect the provisions of Chapter IV. The rules framed under this section do not contain anything to guide the Regional Transport Authority in the matter of granting the permits save that rule 150 provides that it "shall in all matters be subject to the orders of the Government and shall give effect to all orders passed by the Government whether on appeal or otherwise." Section 43-A of the Act, however, gives the State Government power to issue orders and directions to the Regional Transport Authority. That section is in htese terms :

"The State Government may issue such orders and directions of a general character as it may consider necessary, in respect of any matter relating to road transport, to the State Transport Authority or a Regional Transport Authority ; and such Transport Authority shall give effect to all such orders and directions."

We are not concerned with the State Transport Authority in this case. The Act is a Central Act and section 43-A was introduced into it by an amendment made by the Legislature of the Province of Madras. The Government of Madras from time to time issued orders under this section providing certain considerations for the guidance of the Regional Transport Authorities in deciding applications for the grant of permits for stage carriages. The appellant's contention is that the permit was refused to it by applying one of these orders which was not applicable to its case. Section 64 of the Act permits an appeal to an appellate authority from an order of a Regional Transport Authority refusing to grant a permit. This appellate authority in the State of Madras is called the Central Road Traffic Board. Section 64-A which again was introduced into the Act by an amendment of the legislature of the Province of Madras, empowers the Government to look into the records of any case concerning the grant of a permit and pass such order as it thought fit.

Now as to the facts of this case, on March 28, 1953, the Government issued an order under section 43-A marked G.O. Ms. No. 1037 laying down certain considerations to be observed in granting permits. On November 15, 1954, the Government issued another order marked G.O. Ms. No. 3353 superseding the second paragraph of G.O. Ms. No. 1037 and substituting fresh provisions in its place. As I do not consider it necessary to discuss the terms of these orders, it will tend to clarity to proceed on the basis as if G.O. Ms. No. 3353 superseded G.O. Ms. No. 1037 wholly.

The appellant, the respondent No. 4 and eight other persons, had applied for the permit for a route for which applications had been invited. It does not appear from the record when these applications had been made, but it appears that on April 9, 1955, the Regional Transport Authority after hearing all the competing applicants granted the permit to the appellant applying G O. Ms. No. 3353, this being the order then in force. Soon thereafter, namely, on May 20, 1955, the Government passed under the same section a fresh order being G.O Ms No. 1403 cancelling G.O. Ms. No. 3353 and on June 15, 1955, it passed another order being G O. Ms. No. 1689 which, for the purpose of this case it may be said, had the effect of restoring G.O. Ms. No. 1037.

On or about June 23, 1955, the respondent No. 4, who will be referred to as the respondent as he is the only contesting respondent, preferred an appeal to the Central Road Traffic Board against the decision of the Regional Transport Authority. It may be that some of the other disappointed applicants for the permit also preferred similar appeals but with them we are not concerned. The Board considered the representations of all the parties before it and made an order on June 25, 1955, setting aside the decision of the Regional Transport Authority and granting the permit to the respondent. According to the appellant, in making this order the Board followed G.O. Ms. No. 1037. The complaint of the appellant is that the Board went wrong in doing so as G.O. Ms. No 1037 was not in force when the appellant's application was considered by the Regional Transport Authority but had been brought into force subsequently, and as the Board was only hearing an appeal from the Regional Transport Authority it was bound to decide the case according to the order in force when the Regional Transport Authority made its decision and was not entitled to decide it according to an order which came into existence subsequently. The appellant took the matter up to the Government under section 64-A of the Act but the Government refused to interfere.

The appellant then moved the High Court at Madras for a writ of *certiorari* quashing the orders of the Board granting the permit to the respondent and of the Government refusing to interfere. Rajagopalan, J., who heard the application thought that the Government had failed to exercise its jurisdiction by not deciding a point raised before it, namely, whether the appeal to the Board had been made

within the prescribed time. He, therefore, set aside the order of the Government and sent the case back for reconsideration.

The respondent went up in appeal from the order of Rajagopalan, J. The appeal was heard by a bench of the same High Court consisting of Rajamannar, C.J., and Ramaswami, J., and was allowed. The learned Chief Justice who delivered the judgment of the Court, held that Rajagopalan, J., was not right in thinking that the Government had failed to decide whether the appeal to the Board had been filed by the respondent within the prescribed time. He rejected the contention of the appellant that the order of the Board was liable to be set aside inasmuch as it had been made pursuant to G.O. Ms No. 1037 which was not the order in force when the Regional Transport Authority heard the matter. He observed,

"these Government Orders, which are in the nature of general administrative directions to the transport authorities, do not vest any rights, indefeasible rights—in any applicant for a stage carriage permit".

He also held :

"It cannot be said that because on the date of the disposal of the application by the Regional Transport Authority a particular G.O. was in force, any one had a vested right conferred on him by that G.O. We think that it was permissible to the Central Road Traffic Board to decide between the claimants on the basis of the G.O. which was in force at the time the appeal was being heard."

The appellant has now come to this Court by Special Leave in appeal against this judgment.

Only one point has been argued by Mr. Pathak appearing in support of the appeal. He said that the Board was a quasi-judicial tribunal and an order made by it is therefore liable to be quashed by a writ of *certiorari* if that order discloses an error apparent on the face of it. He then said that the order of the Board of June 25, 1955, was erroneous in law as it decided the case by the terms of G.O Ms. No. 1037, which was brought into force after the date of the decision of the Regional Transport Authority and had not been given a retrospective operation, and the Board which was hearing an appeal from the Regional Transport Authority, could only decide whether that Authority had gone wrong in the application of the provisions in force at the time of the hearing before it, namely, the provisions contained in G.O. Ms. No. 3353. He also said that such error was apparent on the face of the record as the Board in its decision stated that it was deciding the case by G.O. Ms. No. 1037.

It has not been contended before us that the Board is not a quasi-judicial Tribunal. It clearly is so. In view of the many decisions of this Court in similar matters it would be impossible to take a contrary view. Then again it is a principle firmly established and accepted by this Court that a writ of *certiorari* can issue where the decision of a tribunal discloses an error of law apparent on its face. I am also clear in my mind that if it was an error for the Board to have followed G.O. Ms. No. 1037, such error appeared on the face of its decisions for it expressly purported to be guided by G.O. Ms. No. 1037. The only questions that remain are whether this was an error and an apparent error. These I now proceed to discuss.

It is true that G.O. Ms. No. 1037 which had been superseded by G.O. Ms. No. 3353 on November 15, 1954, was revived by G.O. Ms. No. 1689 issued on June 15, 1955, *i.e.*, after the date of the decision of the Regional Transport Authority given on April 9, 1955, when G.O. Ms. No. 3353 prevailed. I will assume now that G.O. Ms. No. 1689 did not bring back G.O. Ms. No. 1037 with retrospective force. Was the Board then wrong in applying G.O. Ms. No. 1037 when it decided the appeal from the Regional Transport Authority's decision ? I do not think so.

It may be that when one regular and ordinary Court hears an appeal from the decision of another such Court, it cannot, generally speaking, take into consideration a law which has been passed since that decision. But it is far from clear that the same rule applies when an appeal from the order of a quasi-judicial tribunal is heard by another such tribunal, as is the case here. No authority to warrant such a proposition was cited and as at present advised, I am not prepared to assent to it. In any

case; it can safely be said, and it is enough for the purpose of this case to do so, that it is far from clear that a quasi-judicial tribunal like the one before us is not entitled in hearing appeal from another such tribunal to apply a rule which has come into existence since the decision under appeal. If it is not so clear there of course is no error apparent on the face of the record.

It cannot be overlooked that such a tribunal is not enforcing a vested right which one party has against another or others. The tribunal is to choose from amongst a number of persons the fittest to be granted a permit. The overriding interest in the selection is of one who is not a party to the proceedings, namely, the travelling public. The lower tribunal is entitled to be heard on an appeal under section 64, a procedure which is wholly inapplicable in appeals from the decisions of what are called Courts of law. As a general rule, a Court gives effect at the trial to the substantive rights of the parties existing at the date of the writ and it is for this reason that a change in the law cannot ordinarily be taken into account in appeals. Now such a consideration does not prevail in the present case. It is not said that a person when he makes an application for a permit acquires a right to have his application decided by the order under the section then in force. All that is said is that the Transport Authority must consider the applications according to the order in force at the time it hears them. If this is so, as I think it is, then the basis for saying that the appellate authority cannot consider a Government order issued since the order under appeal was made, completely disappears. Another reason given for the view that a Court of appeal cannot take into consideration a new law is that, "a matter of substantive right which has become *res judicata* cannot be upset by a subsequent general change of the law" : see *Re a Debtor, Ex parte Debtor*[1]. Now it does not seem to me possible to say that an applicant for a permit has a substantive right to the permit vested in him. Nor is it possible to conceive of the decision of a Regional Transport Authority in granting or refusing to grant a permit as having any operation by way of *res judicata*. It therefore seems to me that there is no warrant for applying the general rule applicable to a Court of law hearing an appeal from a similar subordinate Court which prevents it from taking notice of a new law, to tribunals such as those with which this case is concerned.

I wish to add one thing more on this subject. Even in the case of appeals strictly so called, the Court hearing the appeal may take cognisance of new laws which are made applicable to pending cases : See *Quilter* v *Mapleson*[2]. I have so long been proceeding on the assumption that G.O. Ms. No. 1689 had no retrospective effect at all. Now it seems to me that there is at least grave doubt if G.O. Ms. No. 1689 which revived G.O. Ms. No. 1037, was not intended to be applied to pending appeals. It was directed only to the Central Road Traffic Board which heard appeals, and this would indicate that it was intended that the Board would follow it in deciding the appeals that were then pending before it. It is not therefore clear that G.O. Ms. No. 1689 was not intended to have at least this retrospective effect. If it did, which on the form of the order it may well be said to have done, then that would be another reason for saying that it is not clear that the Board was in error in applying it.

In my view, therefore, it has not been shown that the Board committed an error apparent on the face of its decision in applying G.O. Ms. No. 1037 to the appellant's case. This appeal must, therefore, fail.

Before leaving the case I wish to express my opinion on a matter which was pressed on behalf of the respondent. It was said that only administrative orders could be made under section 43-A which orders were not laws, and therefore an error with regard to them would not be an error of law which would warrant the issue of a *certiorari*. I am unable to assent to this contention. To my mind the question is not solved by describing the orders as administrative orders, a term as to the meaning of which, I confess, I am not clear. So it does not seem to me to

1. L.R. (1936) Ch. 237, 243. 2. (1882) L.R. 9 Q.B.D. 672.

be necessary to enquire what kind of orders could be issued under section 43-A. In my view if an order under the section is one to the observance of which a person is entitled, that would be a law, a mistake of which would justify the issue of the writ at his instance. The whole justification for a writ of *certiorari* is to prevent, where no other remedy is available, a patent injustice being allowed to stand. It would be strange if a person was entitled to the observance of a rule and was held not to have a remedy for its breach. It can make no difference by what name that rule is called. I wish to read here as a salutary advice to follow, what Pollock, C.B. and Martin, B., said in *The Mayor of Rochester* v. *The Queen*[1], regarding the writ.

"Instead of being astute to discover reasons for not applying this great consitutional remedy for error and mis-government, we think it our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable."

The real question thus is whether the applicants for permits were entitled to the observance of the orders with which we are dealing. I think they clearly were. The orders were made under a statutory provision. That itself would make them binding. Further, the statute expressly says that the "Transport Authority shall give effect to all such orders and directions". The statute applies to all ; every one is entitled to the benefit of it. Any person interested has therefore a right to claim that an order passed under the section shall be observed by the Transport Authorities. The respondent himself made such a claim and has got the benefit of one of these orders.

It was, however, said that it is true that the Transport Authorities owed a duty to observe the orders but that was a duty they owed to the Government alone and that a breach of this duty only exposed them to disciplinary action by the Government but did not vitiate their decisions. I find no words in the section so to limit the scope of the duty imposed by it on the Transport Authorities. The nature of the orders makes it impossible to think that it was intended to visit a breach by disciplinary action only. These orders lay down principles to be applied in deciding whether a person should or should not be given a permit. They affect persons materially; they affect persons' living. I find it very difficult to think that the only sanction for such rules can be disciplinary action. It seems to me abhorrent that judicial bodies should in the discharge of their functions be subjected to disciplinary action. Then I think it would certainly be a very unusual statute which sets up quasi-judicial tribunals with power to affect people materially and binds the tribunals on pain of disciplinary action only to proceed according to rules made under its authority but gives the persons deeply affected by the tribunal's decision no right to claim that the rules should be observed. I am unable to hold that the Motor Vehicles Act is a statute of this kind.

I ought to refer to the case of *Nagendra Nath Bora* v. *The Commissioner of Hills Division and Appeals, Assam*[2]. That was a case concerning a licensing authority for liquor shops. It was there said that a breach of certain executive instructions issued to the licensing authority did not amount to error of law. I think that case is clearly distinguishable. It dealt with executive instructions and therefore not such as were issued under a statutory power. There is nothing to show that it was the bounden duty of the tribunal, the licensing authority, to obey these instructions. Had it not been that a hierarchy of appeals had been provided for, it would perhaps have been held in that case that the authority was not a quasi-judicial authority at all. Furthermore, it was held there that no one had an inherent right to a settlement of a liquor shop. Therefore it seems to me that that case does not help in deciding the effect of the orders issued under section 43-A. It is interesting to note that it was said in that case referring to the writ of *certiorari* at page 412 that:

"Its purpose is only to determine, on an examination of the record, whether the inferior tribunal has exceeded its jurisdiction or has not proceeded in accordance with the essential requirements of law which it was meant to administer."

1. (1858) El. Bl. & El. 1024, 1033 : 120 E.R. 791. 2. (1958) S.C.J. 798 : 1958 S.C.R. 1240.

The words "law which it was meant to administer" are very significant. The Transport Authorities in the present case were certainly meant to administer the orders issued under section 43-A.

There is one thing more that I wish to observe in this connection. It may be that an order which it is the bounden duty of the Transport Authority to obey may give it a certain amount of discretion, but that in my view would not make the order any the less a law. If the discretion has been duly exercised, there would be no error of law for the law itself gives the discretion. It would be the bounden duty of the tribunal to observe that law and so if necessary to exercise the discretion given by it.

For the reasons earlier mentioned, however, I agree that the appeal should be dismissed.

Appeal dismissed.

[END OF VOLUME (1959) 2 M.L.J. (SUPREME COURT.)].